California Law Review

VOL. 67 SEPTEMBER 1979 NO. 5

"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory©

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The United States Supreme Court has long insisted, as a matter of constitutional doctrine, that legislative action must be rationally related to the accomplishment of some legitimate state purpose. This rationality requirement has been advanced as the most minimal of constitutional limitations on legislative action.[1] It has been variously phrased[2] and has appeared in several constitutional guises, most prominently as an elaboration of the due process and equal protection guarantees.

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1. This Article will not address the related issues of nonlegislative state action. In applying the rationality requirement, courts usually treat legislative and administrative action as equivalent. As a result, a number of the cases on which I will draw involved administrative rather than legislative policy decisions. I doubt the wisdom of conjoining the two doctrinally, *see, e.g.*, Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977) [hereinafter cited as Sandalow II], but the present Article is meant to address solely issues of review of legislation.

2. Sometimes the Court speaks of "reasonableness," rather than "rationality." The Court also uses the words "arbitrary," "capricious," and "invidious" apparently as alternative formulations of the rationality requirement. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351, 355 (1974); Richardson v. Belcher, 404 U.S. 78, 84 (1971); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 676-77 (1966) (Black, J., dissenting); Baxstrom v. Herold, 383 U.S. 107, 115 (1966); Phillips Chem. Co. v. Dumas Indep. School Dist., 361 U.S. 376, 385 (1960); Wieman v. Updegraff, 344 U.S. 183, 192 (1952); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (Brandeis, J., dissenting); Dent v. West Virginia, 129 U.S. 114 (1889).

This Article explores the theory and practice of the rationality requirement.

Conclusions about whether the requirement is met in particular instances are so commonplace among those trained in law that it is easy to assume that its abstract meaning is well and commonly understood. Most attention is thus directed at what is assumed to be the more difficult question of whether some more stringent standard is required to test the constitutionality of the legislative action under review.

Courts and particularly scholars have been pausing longer of late to question the assumption of a common and clear understanding of the rationality requirement.[3] As the elements of that superficially simple doctrine are more rigorously probed, it becomes inereasingly clear that tlie rationality requirement masks—and in many ways exaggerates—tlie fundamental problems of reconciling "democracy" with the role of tlie courts in constitutional review of legislation, problems that are usually associated with the more stringent standard question.

A growing number of critics suggest that no satisfactory meaning can be given to the requirement that legislation be rationally direeted to a perinissible end. Hans Linde, whose discussion of the rationality requirement[4] is tlie most thoroughgoing to date, concludes that the requirement that "every law . . . be a rational means to a legislative end is itself not a rational premise for judicial review . . . ."[5] "It is a realistic postulate," Linde says, "that laws do not get enacted for no reason at all . . . ."[6] Tlie "reason," however, may be complex.

> [A] policy often results from the accommodation of competing and mutually inconsistent values, or because it simply intends to favor one interest at the expense of another, or because it represents only a judgment of the justice or equities on the immediate issue without intending to accomplish any further aim.[7]

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3. *See, e.g.*, Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1; Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972). *See also* Sandalow II, *supra* note 1, at 1183; Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 660 (1975) [hereinafter cited as Sandalow I]; *cf.* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970), which initiated much of the recent discussion of the longstanding issues to which this Article attempts to contribute.

4. Linde, *supra* note 3. Hans Linde, now an Associate Justice of the Oregon Supreme Court, was a professor at the University of Oregon School of Law when he wrote this Article. Like Linde, *id.* at 206 n.24, I must acknowledge my debt to the work of Professors Ely, Tribe, and Brest. In addition, although I disagree with much of what Linde concludes, mine is admiring and grateful disagreement, for his Article was instrumental in clarifying the issues addressed in the present effort.

5. *Id.* at 235-36. *See* Note, *supra* note 3, at 128, 154.

6. Linde, *supra* note 3, at 212.

7. *Id.*

Linde and other critics often embrace what Richard Posner calls the "new realism about the political process."[8] As Posner characterizes this realism, it explains much, perhaps most, legislative activity as the result of "superior ability . . . to manipulate the political process:"[9]

> Many public policies are . . . explained as the outcome of a pure power struggle—clothed in a rhetoric of public interest that is a mere figleaf—among narrow interest or pressure groups. The ability of such groups to obtain legislation derives from their money, votes, cohesiveness, ability to make credible threats of violence or other disorder if their demands are not met, and other factors all totally unrelated to the abstract merit of the policy at issue.[10]

For a court to undo what this process yields, Posner concludes, is "to condemn as unconstitutional the most characteristic product of a democratic (perhaps of any) political system."[11]

It is possible that the Supreme Court has used the rationality requirement simply as shorthand for judicial deference to this political process. Certainly there have been instances in which the outcome of a constitutional question has been determined by the Court's decision whether to apply the rationality requirement or a more stringent standard instead. Application of the latter signaled doom for the legislation. Application of the former reflected the Court's prior conclusion that the law under review had "adequate explanation . . . in whatever combination of policies caused . . . [it] to take the shape . . . [it] did."[12]

Much of the history of the rationality requirement, however, belies such a limited view of its function. For a period of about thirty years—from the late 1930's until the late 1960's—the Supreme Court rarely employed the requirement as a basis for finding legislation unconstitutional. A longer view, however, reveals that the requirement of legislative rationality in the service of legitimate purposes has had remarkable staying power and substantial "bite."[13]

While there were perhaps precursors,[14] the requirement took rec-

8. Posner, *supra* note 3, at 28 n.51.

9. *Id.* at 28.

10. *Id.* at 27.

11. *Id.* at 28.

12. Linde, *supra* note 3, at 203.

13. This use of the word is Gerald Gunther's, though he was not referring to the "bite" of the rationality requirement. *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).

14. Yick Wo v. Hopkins, 118 U.S. 356 (1886), hinted at a general requirement under the equal protection clause of official nonarbitrariness. In a classic article, James B. Thayer found ample precedent, including much predating the fourteenth amendment, for the proposition that "whatever choice is rational is constitutional." Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). The rationality to which Thayer was referring, however, was in the judgment that the exercise of legislative authority by Congress was within the categories of authority assigned to that body by the Constitution. The "rationality"

ognizable form towards the end of the nineteenth century. In *Gulf Colorado & Santa Fe Railway v. Ellis*,[15] decided in 1897, a Texas statute provided for the collection of attorneys' fees in certain successful actions against railroads but not in actions against other defendants. The Supreme Court found a denial of equal protection and said:

> [T]he mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, . . . it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.[16]

The early 1900's brought the reign of substantive due process exemplified by *Lochner v. New York*,[17] which struck down state legislation limiting the number of hours per week bakery workers could be employed. In *Lochner*, as in many other substantive due process cases, language of reasonableness is prominently laced with references to freedom of contract and discussion of the limits of the police power of states. One of several *Lochner* era formulations of the rationality requirement still quoted frequently is from *F.S. Royster Guano Co. v. Virginia*:[18] a "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ."[19]

Another formulation comes from *Thompson v. Consolidated Gas Co.*,[20] a 1937 decision often cited as the last of the "economic" due process cases. Writing for the Court, Justice Brandeis found a natural gas proration order of the Texas Railroad Commission in violation of the due process clause. The Texas order was defended as a measure to prevent waste. "[O]bviously," Justice Brandeis said, "the proration orders would not be valid if shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights, or if shown to be otherwise arbitrary."[21]

In the forties and into the fifties the Court's attention increasingly

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of such a judgment is quite a different matter from the "rationality" of means developed here. Thayer's use, for instance, cannot be subjected to Felix Cohen's accusation, *see* text accompanying note 55 *infra*, that it makes "our courts lunacy commissions sitting in judgment upon the mental capacity of legislators." THE LEGAL CONSCIENCE, SELECTED PAPERS OF FELIX S. COHEN 44 (L.K. Cohen ed. 1960). Alexander Bickel introduced some confusion concerning the rationality requirement by adopting Thayer's use of it to repulse Cohen's broadside at the more modern target. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 37-39 (1962).

15. 165 U.S. 150 (1897).
16. *Id.* at 165-66.
17. 198 U.S. 45 (1905).
18. 253 U.S. 412 (1920).
19. *Id.* at 415.
20. 300 U.S. 55 (1937).
21. *Id.* at 69-70.

turned from the free market to the free individual. The principal vehicle for judicial assertiveness became incorporation of the Bill of Rights' protections into the fourteenth amendment. Language of rationality was largely avoided in striking down legislation, perhaps because of its association with the excesses of economic due process. Judicial articulation of the requirement in upholding legislation continued during this period,[22] however, and in the 1950's, language of rationality slowly began to reappear in Court decisions holding legislation unconstitutional.[23]

The 1957 decision in *Morey v. Doud*[24] even seemed to resurrect economic due process. Illinois had generally subjected firms selling or issuing money orders to a regime of licensing and regulation. The legislation exempted the American Express Company by name.[25] The Court said that the purpose of the regulatory scheme was "to protect the public when dealing with currency exchanges."[26] It found the American Express exemption unconstitutional, saying that "a statutory discrimination must be based on differences that are reasonably related to the purpose of the Act in which it is found."[27]

A trickle of rationality requirement cases continued into the 1960's. In the clearest example, *Rinaldi v. Yeager*,[28] New Jersey recovered the cost of trial transcripts provided to indigent defendants from their earnings in prison after they were incarcerated. For those indigents convicted but not sentenced to prison, however, there was neither a reimbursement mechanism nor a requirement of repayment. The Court tested the discrimination between incarcerated and unincarcerated indigents for its rational relationship to a "fiscal objective" and concluded that the distinction "bears no relationship whatever to the purpose."[29]

While the rationality requirement was experiencing a tentative rebirth, the 1960's also witnessed the increasing dominance of the equal

22. A famous example is Williamson v. Lee Optical Co., 348 U.S. 483 (1955). *See* text accompanying note 194 *infra*.

23. *See* Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

24. 354 U.S. 457 (1957).

25. The United States Post Office, the Postal Telegraph Company, and Western Union Telegraph Company were also explicitly exempted, but these three exemptions were assumed justifiable because of the substantial government involvement with each.

26. 354 U.S. at 464.

27. *Id.* at 465. *See* Phillips Chem. Co. v. Dumas Indep. School Dist., 361 U.S. 376 (1960). Dissents throughout the period continued to rely on the rationality requirement. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464, 467 (1948) (Rutledge, J., dissenting). *See generally* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process-Formula,"* 16 U.C.L.A. L. REV. 716, 722-23 (1969).

28. 384 U.S. 305 (1966). *See also* Jackson v. Indiana, 406 U.S. 715 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966).

29. 384 U.S. at 309.

protection clause in judicial review of state legislation. The now familiar strict scrutiny equal protection test was to be applied when legislative action was drawn along "suspect" lines or invaded "fundamental" interests.[30] When found applicable, the test required that the challenged legislative action be necessary to the accomplishment of a "compelling state interest." During the late 1960's, strict scrutiny became the principal vehicle for a large volume of judicial activity striking down state legislation in the name of equal protection.

By the end of the 1960's then, a dichotomous equal protection test appeared to be firmly established. Strict scrutiny was " 'strict' in theory" but "fatal in fact,"[31] and application of the rationality requirement commonly accompanied a finding that the state action under review was constitutionally permissible.

The rationality requirement did not, however, remain subordinate. Dissatisfaction with a polarized equal protection test emerged, and the rationality requirement was put to substantial service again. In 1971, in *Reed v. Reed*,[32] the Court found a denial of equal protection in an Idaho statute that gave a preference to males over females for appointment as administrators of estates. The Court characterized the issue as "whether a difference in sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the [statute]."[33] Since *Reed*, the Court has experimented with formulations that avoid (or combine) both the language of rationality and of strict scrutiny.[34] It has also repeatedly em-

30. Strict scrutiny had earlier origins. The phrase derives from the 1942 decision in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), where the Court in the name of equal protection struck down an Oklahoma attempt to sterilize those convicted three or more times of certain felonies. *See* text accompanying note 59 *infra*. *Skinner* is usually cited as the progenitor of the fundamental rights branch of the compelling state interest test because its "strict scrutiny" was apparently applied to give added protection to the "fundamental" interests in marriage and procreation. 316 U.S. at 541. The language of "suspect" classifications derives from Korematsu v. United States, 323 U.S. 214, 216 (1944), where the Court upheld the Japanese exclusion orders but only because of "apprehension by the proper military authorities of the gravest imminent dangers to the public safety." *Id.* at 218. Despite the occasional use of language similarly suggestive of an equal protection test stricter than rationality, *see, e.g.*, Carrington v. Rash, 380 U.S. 89, 96 (1965); Reynolds v. Sims, 377 U.S. 553, 561-62 (1964), Justice Harlan could still insist in a 1966 dissent that "[n]o such dual-level test has ever been articulated by this Court." Katzenbach v. Morgan, 384 U.S. 641, 660-61 (1966) (Harlan, J., dissenting). By 1969, however, Justice Harlan was forced to recognize, though still decrying, a full-blown, two-tiered equal protection. Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting).

31. Gunther, *supra* note 13, at 8.

32. 404 U.S. 71 (1971).

33. *Id.* at 76.

34. In Bullock v. Carter, 405 U.S. 134 (1972), the Court said that the law under review "must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives." *Id.* at 144. In Stanley v. Illinois, 405 U.S. 645 (1972), the Court found a state law unconstitutional because "it needlessly risks running roughshod over . . . important interests." *Id.* at 657. In Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), the Court found "no signifi-

ployed the rationality requirement in one form or another to find legislation unconstitutional.[35]

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cant relationship to . . . recognized purposes." *Id.* at 175. In Police Dep't v. Mosley, 408 U.S. 92 (1972), the Court said that "in all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered." *Id.* at 95. In Gomez v. Perez, 409 U.S. 535 (1973), the Court spoke of a State "invidiously discriminating . . . by denying substantial benefits." *Id.* at 538. In Rosario v. Rockefeller, 410 U.S. 752 (1973), the Court found a statutory time limit "not an arbitrary [one] . . . unconnected to any important state goal." *Id.* at 760. In Turner v. Department of Employment Security, 423 U.S. 44 (1975), the Court held a Utah statute unconstitutional, saying that the State "must achieve legitimate state ends through more individualized means when basic human liberties are at stake." *Id.* at 46. In Craig v. Boren, 429 U.S. 190 (1976), the Court said that classifications by gender must serve "important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197, *quoted in* Personnel Adm'r v. Feeney, 99 S. Ct. 2282, 2293 (1979), Caban v. Mohammed, 99 S. Ct. 1760, 1766 (1979), Orr v. Orr, 440 U.S. 268, 279 (1979), and Califano v. Webster, 430 U.S. 313, 316-17 (1977). In Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977), a case involving a challeuge to a voting scheme, the Court characterized the issue as whether the differing interests of classes of voters each given a veto "are sufficient . . . to justify the classifications." *Id.* at 271. In Trimble v. Gordon, 430 U.S. 762 (1977), the Court said that "[t]raditional equal protection analysis asks whether . . . statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives." *Id.* at 773-74. In United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), the Court said that repeal of an interstate covenant could survive a contract clause challenge only if "reasonable and necessary to serve an important public purpose." *Id.* at 25. In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Court said that "when the government intrudes on choices concerning family arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.* at 499. In Zablocki v. Redhail, 434 U.S. 374 (1978), the Court said that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Id.* at 386. At another point in the same opinion the Court said "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Id.* at 388. In First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), the Court suggested that an infringement upon a corporation's rights of free speech required a "substantially relevant correlation between the governmental interest asserted and the State's effort . . . ." *Id.* at 795 (quoting Shelton v. Tucker, 364 U.S. 479, 485 (1960)). In Hicklin v. Orbeck, 437 U.S. 518 (1978), the Court found a violation of the privileges and immunities clause of the fourteenth amendment because the state discrimination against nonresidents did not "bear a substantial relationship to the particular 'evil' they are said to present." *Id.* at 527. *Cf.* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Quilloin v. Walcott, 434 U.S. 246 (1978); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Wooley v. Maynard, 430 U.S. 705 (1977); Whalen v. Roe, 429 U.S. 589 (1977); Bellotti v. Baird, 428 U.S. 132 (1976); Planned Pareuthood v. Danforth, 428 U.S. 52 (1976); Matthews v. Lucas, 427 U.S. 495 (1976); Examining Bd. v. De Otero, 426 U.S. 572 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); American Party v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Mahan v. Howell, 410 U.S. 315 (1973); Jackson v. Indiana, 406 U.S. 715 (1972).

35. Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Jimenez v. Weinberger, 417 U.S. 628 (1974); Procunier v. Martinez, 416 U.S. 396 (1974); Lubin v. Panish, 415 U.S. 709 (1974); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); O'Brien v. Skinner, 414 U.S. 524 (1974) ("wholly arbitrary"); Unitcd States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Lindsey v. Normet, 405 U.S. 56 (1972). *See also* Ambach v. Norwick, 99 S. Ct. 1589, 1597 (1979) (Blackmun, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.); New York City Transit Auth. v. Beazer, 440 U.S. 568,

Perhaps the rationality requirement weathered a thirty-year period of desuetude because it served as a convenient, if vacuous, label that the Court could apply when it felt compelled to say something about why legislation was constitutionally permissible. And it may be that the requirement's reemergence is due less to any meaning its words import than to its usefulness as a handy catch phrase to which the Court may resort when it is uneasy with the other formulations at its command. It is the contention of this Article that the rationality requirement is much more than a catch phrase, that it expresses instead much of what is enduring and useful in the American institution of judicial review of legislation. In assessing the validity of that conclusion, the thirty-year period of disuse seems more remarkable for keeping the rationality requirement alive than for failing to make much use of it. That period was marked not only by extraordinary judicial activism, but also by judicial revulsion at an earlier form of activism carried on largely in the name of the rationality requirement. That the Court should have reached for new formulations seems less significant than that it is now returning to the old.

The checkered history of the rationality requirement, however, has left a good deal of doctrinal detritus that stands in the way of reasoned inquiry into its content and proper function in judicial review of legislation. Much of what the Court has said in the name of "rationality," particularly in the 1950's and 1960's, if taken seriously, would deprive the requirement of all real content. The Court has declared, for instance, that a legislative classification must be a rational means to accomplish the objectives of the statute in which it appears.[36] It has also announced that a means is a rational way to an end if it tends to accomplish that end to the slightest degree.[37] If these two statements are conjoined with a recognition that "[l]egislation is frequently [and legiti-

593 (1979) (Powell, J., dissenting); *Id.* at 597 (White and Marshall, JJ., dissenting); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 186 (1979) (Rehnquist, J., concurring); Zablocki v. Redhail, 434 U.S. 374, 391 (1978) (Stevens, J., concurring); Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (Brennan and Marshall, JJ., concurring); Califano v. Goldfarb, 430 U.S. 199 (1977); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); James v. Strange, 407 U.S. 128, 140 (1972) ("some rationality . . . lacking"); Mayer v. City of Chicago, 404 U.S. 189, 196 (1971) ("unreasoned distinction").

36. *E.g.*, Morey v. Doud, 354 U.S. 457, 465 (1957), *overruled on other grounds*, City of New Orleans v. Dukes, 427 U.S. 297 (1976); Reed v. Reed, 404 U.S. 71, 75-76 (1971). Actually, this formulation is frequently employed in cases such as *Morey* and *Reed* where the decision is against the statute's constitutionality. The Court uses the device to limit the possible legitimating purposes and thus narrows the chance for rational service of the statutory "purpose." *See* text accompanying note 51 *infra*.

37. *E.g.*, McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Railway Express Agency, Inc. v. New York, 335 U.S. 106, 109-10 (1949); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947).

mately] multipurposed,"[38] it is difficult to conclude that the rationality requirement has any substantial meaning. A legislature might enact a distinction that did not in the least advance any objective it had identified. But the chance of its doing so is sufficiently remote—and the Court's ability confidently to conclude that it had done so still more remote—that a rationality requirement so understood would in practice be no requirement at all.

In addition, the Supreme Court of the 1950's and 1960's nurtured a twin set of fictions that, if seriously credited in the extreme form they sometimes took, would reduce to a nullity a requirement of legislative rationality in pursuit of legitimate ends. The first fiction suggested that a finding of rationality could be based on assumptions of reasonably conceivable but demonstrably false facts. In *McGowan v. Maryland*[39] the Court upheld the State's Sunday closing laws against a variety of constitutional attacks, including one under the banner of the rationality requirement. Chief Justice Warren, writing for the Court, pointed to interests in health and recreation that might conceivably be served by the pattern of activities that were allowed and disallowed on Maryland Sundays. In a famous dictum the Chief Justice declared: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[40]

The second fiction found legislation rational in terms of its service of "purposes" that need never in any form or at any time have entered the mind of any legislator. The most forthright statement of this principle came from the pen of Justice Harlan, writing in *Flemming v. Nestor*,[41] where the Court reviewed congressional legislation that denied social security benefits to certain kinds of deportees. Justice Harlan found a justification in the fact that benefits for the deportees, who would presumably reside abroad permanently, would not add to the "over-all national purchasing power."[42] Unabashedly, Justice Harlan said that it was "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision . . . ."[43] If no facts could reasonably be conceived to make legislation a rational way to serve its actual purpose, an imagined purpose would surely suffice.

Taken literally, the *McGowan* dictum raises troublesome questions. If no factual proof is permitted, reasonable conceivability will vary with the imaginativeness of judges and the information from ex-

38. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 n.11 (1977). *See* Vance v. Bradley, 440 U.S. 93 (1979).

39. 366 U.S. 420 (1961).

40. *Id.* at 426.

41. 363 U.S. 603 (1960).

42. *Id.* at 612.

43. *Id.*

tra-record sources they allow to shape their imaginations. But if extra-record facts necessarily play a role in what judges determine to be "reasonably conceivable," it would be anomalous to exclude facts of record in making that judgment. It would be no less anomalous that facts delimiting what was conceivable were not proved because they were not permitted to be proved.

The *McGowan* language is actually drawn from the much earlier case of *Lindsley v. Natural Carbonic Gas Co.*,[44] but there the Court suggested that the party with the burden of pleading irrationality would be given the opportunity to prove it. Indeed, the *McGowan* Court itself, following its famous dictum, proceeded to speak of a record "barren of any indication that . . . the apparently reasonable basis does not exist . . . ."[45] While the *McGowan* language is still invoked on occasion to justify ignoring facts of record,[46] increasingly the Court has shown a willingness to consider whatever facts the parties have been able to prove.[47]

The fictionalizing of purposes is a more touchy subject, because court concern with legislative motivation raises difficult questions.[48] We will see later that substantial flexibility in defining the "purpose" against which legislation is to be tested for its rationality is essential if the rationality requirement is to be workable. But flexibility in searching for legislative purpose cannot justify Justice Harlan's willingness to treat as constitutionally irrelevant the part actually played by real purposes in the legislative process. The very word "purposes" suggests the awkwardness of allowing courts to invent them. The "purpose" of a legislature or of legislation is a figure of speech, but the figure is understandable and useful (even if it shrouds many complexities) because of the obvious role that human purposes play in legislative activity. But a "purpose" that admittedly no one entertained has no apparent meaning, nor is one suggested by the cases that invoke the notion.

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44. 220 U.S. 61, 78 (1911).

45. 366 U.S. at 426.

46. *Compare* Dandridge v. Williams, 397 U.S. 471 (1970), *with* Justice Marshall's dissent in the same case, *id.* at 508-30. *Dandridge* also illustrates how each fiction coaxes mischief out of the other. If a purely hypothetical purpose will suffice, then an attempted factual showing of the irrationality of legislation in light of one purpose might be met either by invoking false facts or by hypothesizing a different purpose at a stage of the litigation when factual proof is no longer possible. Thus, Justice Marshall complained that in *Dandridge* it was not until after trial that the State first suggested the "purpose" eventually found by the Court to legitimate the state action. *Id.* at 523-24. *Compare* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 95 n.56 (1973) (Marshall, J., dissenting).

47. *See, e.g.*, Hicklin v. Orbeck, 437 U.S. 518 (1978) (fourteenth amendment privileges and immunities clause decision); Planned Parenthood v. Danforth, 428 U.S. 52, 75-79 (1976); Turner v. Fouche, 396 U.S. 346 (1970).

48. *See generally* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 [hereinafter cited as Brest I].

All legal fictions employ words to describe things other than what they literally describe. For the use of a fiction to be justifiable, however, at the very least the underlying rule of law—without the fictional element—must be acceptable. The cases employing "purpose" fictionally provide no ready idea of what the underlying rule of law would be. Must the legislative action be rationally related to the pursuit of a purpose any person might conceivably have entertained? Or must there be a rational relationship to a purpose conceivably entertained by the very legislature that passed the measure (or that refused to repeal it[49])? In that case, the fictional element is much diluted. But a formulation focusing on purposes conceivably entertained by a specific legislature presents the same difficulties as does a focus on reasonably conceivable facts. Just what may the Court allow itself to "know" about that legislature and the context in which it operated? And will it allow proof of what it does not know or disproof of its surmise?

In its extreme form, fictionalizing purposes would make logically meaningless the rational nexus aspect of the rationality requirement. It is always possible to construct a fictional "purpose" that is perfectly accomplished by a legislative action—a "purpose" to accomplish those things that the action in fact accomplishes.[50] Assuming these "purposes" were deemed legitimate, this would make a "purpose" of urban highway construction to tear down houses, a "purpose" of building a dam to destroy wildlife, a "purpose" of war to kill people. But fictionalizing such bizarre purposes was certainly not what Justice Harlan had in mind. Presumably, he assumed that acceptable fictional purposes would bear closer resemblance to the goals that legislatures can be expected to pursue. But he gave us no guidance in sorting out the fictional and the real elements in the definition of "legislative" purpose.

With these concerns unaddressed it is not surprising that the Court's use of fictitious purposes has been inconsistent. The Court occasionally avoided the Harlan formulation by requiring legislative classifications to be related to the "achievement of the State's objective," or the "objective of the statute."[51] But this formulation was beset with its own problems because it suggested that a statute's purpose was unitary, thus potentially excluding a complex set of compromised purposes.[52]

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49. For discussion of the role of the "purpose" of retention or nonrepeal of legislation, see text accompanying note 97 *infra*.

50. *See generally* Note, *supra* note 3.

51. Lindsey v. Normet, 405 U.S. 56, 70 (1972); Reed v. Reed, 404 U.S. 71, 75-76 (1971); McGowan v. Maryland, 366 U.S. 420, 425 (1961); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947).

52. *See* A. LAFRANCE, M. SCHROEDER, R. BENNETT, & W. BOYD, LAW OF THE POOR 268 (1973).

The formulation, however, does at least turn the Court's attention away from fabricated purposes.

Other factors have restrained the Court's use of fictitious purposes. The air of unreality in justifying legislation by reference to nonmotivating "purposes" must act somewhat to inhibit their use. In addition, the requirement of a rational nexus between statute and purpose tends to restrict the set of fictional "purposes" the Court can meaningfully entertain. It is surely more likely that a case can be made for the rationality (whatever that may turn out to mean) of a given action as a means to accomplish a purpose that in some sense motivated it than to accomplish one that did not.[53] In recent years the legislative purpose fiction too has fallen into disuse as the Court evidences a willingness to restrict the purposes against which it will test legislative rationality to the legislature's "actual purposes."[54]

It is my intention here to take seriously the rationality requirement as a standard for judicial review of legislation. Part I explores the meaning that might usefully be attributed to the rational nexus component of the requirement. Part II does the same for the legitimate purpose component. This discussion will necessarily uncover much that bears on the justification for a court-enforced rationality requirement in a legislative democracy—the question to which I turn explicitly in Part III.

I

GIVING MEANING TO THE RATIONALITY REQUIREMENT: LEGISLATURE IRRATIONALITY IN PURSUIT OF ITS PURPOSE

In his well-known sally about court enforcement of the rationality requirement Felix Cohen observes: "Taken seriously this conception makes of our courts lunacy commissions sitting in judgment upon the mental capacity of legislators . . . ."[55] Cohen's suggestion was that only irrational legislators would produce "irrational" legislation. But Cohen was addressing only the rationality aspect of the formulation. The requirement also limits the ends that may be considered to "legitimate" ones. Even taken on its own terms, however, Cohen's barb misses the mark. Given a legislature of quite rational members free to pursue any purpose at all, it should not be surprising occasionally to

53. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

54. *Compare* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975), *with* United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533-38 (1973).

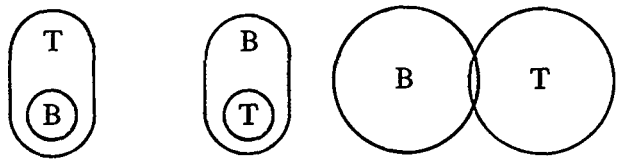
55. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 819 (1935), *quoted in* Linde, *supra* note 3, at 208.

find a legislative product appropriately called "irrational."[56]

For equal protection purposes, legislative rationality is usually discussed as a function of underinclusiveness and overinclusiveness of classification,[57] an approach associated with the classic article of Tussman and tenBroek.[58] They illustrated the notion by positing a legislature attempting to combat hereditary criminality by sterilizing its transmitters.[59] Such sterilization was assumed to raise no constitutional problems aside from rationality.

If the legislature chose to pursue this goal by requiring sterilization of all persons convicted of three felonies, the rationality of that means to accomplish the assumed end would be judged by comparing the class of three-time felons to the class of transmitters of hereditary criminality. If the two classes were entirely coincident the means would be perfectly rational. If there were no common members of the two classes, the means would be utterly irrational. Difficult cases arose where the class burdened (three-time felons) was underinclusive of the class appropriate for accomplishment of the purpose, overinclusive, or simultaneously underinclusive and overinclusive. In this example the legislative classification would be underinclusive if all three-time felons were transmitters of criminality, but not all transmitters were three-time felons. It would be overinclusive if all transmitters were three-time felons, but not all three-time felons were transmitters. And it would be both overinclusive and underinclusive if some but not all three-time felons were transmitters and some transmitters were not three-time felons.

Tussman and tenBroek illustrated the various fits of legislative classification and target group with Venn diagrams. Underinclusive, overinclusive, and simultaneously overinclusive and underinclusive classification can be depicted respectively as



56. Linde specifically denies this. Linde, *supra* note 3, at 229-30. *See also* Sandalow I, *supra* note 3, at 660.

57. Jimenez v. Weinberger, 417 U.S. 628, 637 (1974); Lindsey v. Normet, 405 U.S. 56, 70 (1972); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 520-22 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 997-99 (1978); Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U. L. REV. 89, 123, 139; *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076, 1082, 1084-87 (1969) [hereinafter cited as *Developments*]. *Cf.* Brest I, *supra* note 48, at 106 n.64 (noting the subjectivity used in applying these categories).

58. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

59. The hypothetical case was modeled after Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

where B represents the group burdened by the legislation and T the target group for accomplishment of the legislative purpose. The authors viewed any of these classifications as irrational, but they recognized that a degree of irrationality was justified by "two general sorts of practical considerations."[60] The first was administrative feasibility. If it were very onerous specifically to identify the target class, an overinclusive or underinclusive classification might be the only feasible way to address the problem. The second was "political considerations."[61] Legislatures are subject to blandishments from "pressure groups."[62] Although "the pressure theory of legislation and the equal protection requirement are incompatible,"[63] some tolerance of irrational classifications may be necessary simply because "it is impossible altogether to ignore the pressure situation in which legislatures operate."[64]

This analysis provided an important conceptual tool. It is deficient, however, or at least misleading, in its depiction of irrationality as a function solely of a quantitative relationship between two classes, even if tempered by a recognition of considerations of administrative feasibility and of legislative politics. Webster's tells us that what is rational is what is "agreeable to reason."[65] There are obviously many more particular meanings that can be given to the word, but classificatory fit is not by itself sufficient to evaluate for rationality the legislative means chosen to reach some defined end. Even if there is perfect classificatory fit, legislation will not be "agreeable to reason" if the costs it imposes are great in relation to the benefits it brings, or if there exist less costly means to achieve the same benefit.[66] Conversely, if neither of these conditions exists, rationality can accommodate substantial imperfection in classificatory fit.

Assume, for example, that a medical breakthrough produced a serum that sterilized transmitters of hereditary criminality but not others. The serum was administered by innoculation, a process that was somewhat painful but otherwise harmless except for the sterilization it accomplished. The rationality of an innoculation program for all three-time felons would be a dramatically different question from that of the direct sterilization program, despite the fact that the classificatory fit as posited is identical in the two cases. If we then hypothesize some additional burdens from the innoculation program—occasional serious side

60. Tussman & tenBroek, *supra* note 58, at 349.

61. *Id.*

62. *Id.* at 350.

63. *Id.*

64. *Id.*

65. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1885 (1976).

66. For a case explicitly subsuming alternatives in a rationality discussion, see Lubin v. Panish, 415 U.S. 709 (1974).

effects, for instance—and a relatively harmless alternative, such as an orally administered selective sterilizer, the rationality question changes once more, but again without change in the classificatory fit.

Consider a real life example. Fluoride treatment of teeth is effective in retarding tooth decay for children from infancy through the early teens,[67] but for the rest of the population fluoridation apparently does no appreciable good. Fluoridation carries very slight (mostly cosmetic) drawbacks, which public officials often believe are outweighed by its benefits for youngsters. For the rest of the population, however, the costs of fluoridation, including its associated cosmetic problems, clearly outweigh the benefits. It is possible for children to obtain the benefits by individualized application of fluoride. But for reasons of administrative convenience, fluoridation of the public water supply reaches that target group more effectively and at a tolerable cost. A large number of communities thus have undertaken such programs, despite the vastly overinclusive imposition of burdens on the rest of the population.[68]

The courts have sustained fluoridation programs against a variety of challenges.[69] As long as the burden overinclusively imposed is relatively insignificant and the benefit, even though accruing to a relatively small group, is appreciable, a judgment that the program is a rational one is appropriate. If the dangers to the burdened but not benefited group were more serious—occasional death or incapacitation, for instance—or the benefits less substantial, a judgment of irrationality would at some point become appropriate.

A similar judgment would be possible if the group benefited and not burdened were very large, and the burdened group quite small. Assume that fluoridated water provided minor health benefits with no danger for the entire population with teeth. For newborn infants, however, the treatment presented risk of serious illness or death. Despite the near perfect classificatory fit, the program would be an irrational one.

As a function of costs, benefits, and alternatives, irrationality does not require any imperfection of the classificatory fit. If the costs are too high, even though they are imposed by a perfectly tailored classifica-

67. *See* Bennett, *Allocation of Child Medical Care Decisionmaking Authority: A Suggested Interest Analysis*, 62 VA. L. REV. 285, 299-301 (1976).

68. Note that this overinclusiveness is present despite the fact that there is no classification in the usual sense, since the cost burden is typically imposed on the entire population of a governmental unit. This illustrates that the Tussman and tenBroek formulation does not depend upon a conventional equal protection case.

69. The most recent of the many cases upholding compulsory fluoridation laws is Minnesota Bd. of Health v. City of Brainerd, 308 Minn. 29, 241 N.W.2d 624 (1976).

tion, a judgment of irrationality is appropriate.[70]

This emphasis on the costs of a given means, and of its alternatives, is not to suggest that imperfection of classification is irrelevant to a rationality judgment. We inherit highly individualistic traditions,[71]

70. The recent veterans' preference case, Personnel Adm'r v. Feeney, 99 S. Ct. 2282 (1979), presented the Court with an opportunity it did not grasp to find that irrationally severe costs were imposed by a measure that distributed benefits to precisely that group appropriate to achieve the measure's purpose. Or, to employ another medical example, when a national swine flu innoculation program results in numerous deaths while preventing relatively little influenza, it becomes irrational to continue it, even if the group whose risk of flu is decreased slightly is the same one whose risk of death is greatly enhanced. This example shows that "burden" and "benefit" will often be matters of probability rather than certainty. Some whose "risk" of flu or of death is enhanced by innoculation would not have suffered the fate without it. It is probable that more perfect information would have allowed more perfect classification. From this perspective it becomes fair to ask if "imperfect" classifications justified solely by administrative inconvenience in developing the information necessary to make more "perfect" classifications could not also be treated as "perfect" classifications. Indeed, imperfection in classification due to other administrative difficulties might be thought "perfect" in light of those difficulties. This point serves to reinforce the more general criticism in the text of viewing rationality as a matter of perfection of classificatory fit.

This general qualification of Tussman and tenBroek's analysis may help explain the Court's recent approach to certain classifications used to bestow benefits rather than impose burdens, as in the Tussman and tenBroek example. In the last decade, the Court has increasingly reviewed classifications in public assistance programs—the pattern of favor and disfavor in granting, denying, and determining benefits. While it has occasionally held welfare classifications unconstitutional, *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969), recently it has retreated, taking refuge in an improbable analogy between these classifications and economic regulations of the sort it has been reluctant seriously to review since the passing of the *Lochner* era. *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484, 495 (1974); Dandridge v. Williams, 397 U.S. 471, 484-85 (1970). This reluctance may be understandable in part because redistribution of wealth from some of the more to some of the less well-to-do does not seem an "unreasonable" distribution of burdens and benefits, even though fewer than all the poor receive the benefits. There is no burden in this calculation to outweigh the redistributional benefits.

Many of these results remain questionable, since rationality also depends on the alternatives available to the redistributional end. Even without burdens, an alternative redistributional scheme might bring far greater redistributional benefit. More fundamentally, however, the difference between burdens and benefits is, in important respects, a matter of perspective. As traditional notions of entitlement defined by property law are augmented or replaced by government benefit programs, failure to extend a "benefit" is perceived as imposing a "burden." In James v. Strange, 407 U.S. 128 (1972), for example, the Court used the equal protection clause to protect entitlement to certain exemptions for civil judgment debtors.

What Professor Reich labeled the "new property," Reich, *The New Property*, 73 YALE L.J. 733 (1964), does not yet fully define our sense of entitlement in this way. The Court did, however, recently define "property" in the context of a fifth amendment "taking" as "interests . . . sufficiently bound up with the reasonable expectations of the claimant." Penn Central Transp. Co. v. New York City, 438 U.S. 104, 125 (1978). To the extent our reliance on the "new property" becomes more comparable to our reliance on the old, the failure to extend a benefit will be perceived as a burden to be weighed in the rationality balance. Some benefits, such as Old Age Survivors and Dependents Insurance (OASDI, but "social security" in common parlance), are already associated with a strong "new property" sense of entitlement. The Court has been active recently in reviewing OASDI classifications, although these have been mainly classifications on the basis of gender. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

71. Professor Michelman refers to a "broad tradition of 'western' individualistic democratic liberalism within which our characteristic notions of legal order and doctrine have arisen."

which assume in general that each of us is responsible for his actions, and should be judged on his individual merits. This individualism is variously qualified by the operations of government. The individualism, however, qualifies in turn our view of permissible governmental action. The recent spate of "conclusive presumption" cases,[72] for instance, was an ill-fated attempt to insist on individualized treatment in pursuit of "public" purposes. When official classifications mete out burdens to those without fault or benefits to those with no unusual merit, or otherwise allocate burdens and benefits too widely or too restrictively, the result is properly viewed with suspicion. In this limited way the rationality judgment will take account of imperfect classification.[73] It is made sterile, however, if it is held to do no more.[74]

Usually there will be no way to quantify or otherwise objectify this cost-benefit balancing. Although some commentators have recognized that the rationality requirement provides no escape from judicial value judgments,[75] more typically the rationality requirement is assumed to be value-free,[76] and the more stringent standard question demands attention. A test of "rationality" does suggest substantial judicial effort to discount the judge's own value preferences. But "rationality" is only value-free when it is viewed strictly in terms of classificatory fit—and that is more likely to mislead than to instruct. To recognize that rationality is a function of costs, benefits, and alternatives is to recognize that judicial value judgments at some level are unavoidable even when applying this most minimal of constitutional standards.

But none of this is directly responsive to the question suggested by Cohen: if legislators are rational, is there any reason to think that the legislation they pass will ever not be? The answer, for several reasons, is "yes."

First we must introduce the all too easily neglected time dimension. Legislation is passed at one time, but necessarily reviewed at another. The initial legislative judgment about costs and benefits will

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Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 965-66 (1973). *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 319 n.53 (1978).

72. *See generally* Gordon & Tenenbaum, *Conclusive Presumption Analysis: The Principle of Individual Opportunity*, 71 NW. U.L. REV. 579 (1976).

73. There may be other factors, such as the immutability of the characteristic with regard to which the classification is made, that also affect judgments about the rationality of the classification. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. at 360-61 (Brennan, J., concurring and dissenting).

74. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 53-54 (1973).

75. *See, e.g.*, Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 120-21 (1976).

76. *See, e.g.*, Brest I, *supra* note 48, at 107 n.68; Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 53, 59.

involve prediction. With the passage of time, as information becomes available about how the legislation is working, what originally seemed a rational balance may turn out to be an irrational one. If the rationality judgment can be made in light of new information, rational individuals could be expected occasionally to adjudge a means they originally selected as no longer a rational way to pursue their original goal.[77]

In addition, time changes the environment against which the rationality judgment must be made. In the marketplace it might be perfectly "rational" to pay $100 for a pocket calculator when calculators are first introduced, but quite irrational to pay that much five years later. Similarly, a rational legislator might originally have voted against a state lottery (despite its fundraising potential) because of the high value he placed on insulating the citizenry from the temptation to ruin that he had concluded was engendered by officially sanctioned gambling. But if the federal government had itself introduced gambling in the jurisdiction since that time, or neighboring jurisdictions had brought it to all the state's borders, the same legislator might come to view his original balance as no longer rational.[78]

If an individual comes to view a judgment he once made as no longer rational, however, he needs no outside authority to tell him of its irrationality. If a legislature were equivalent to an individual in this context, it could simply repeal an action it had come to view as no longer rationally justifiable. But legislatures are not individuals. Nonrepeal is a far less deliberative process than enactment. While nonrepeal may show that the legislators continue to view their original judgment as correct, it may also show that the question is not sufficiently important to them to warrant reengaging the legislative process for its reconsideration.

If a balance altered by time were the only reason a legislative judgment might be thought irrational, the case for an external judge of the question would still be rather weak. But there is a much more fundamental difference between individual and legislative decisionmaking that considerably strengthens the case.

We generally regard individuals as rational because we judge their decisions exclusively in terms of their own interests, even though many, perhaps all, individual decisions impose costs and often confer benefits on persons other than the decisionmaker. Our individualistic assumption—that persons are ends in themselves—suggests that individuals

77. Justice Stone's *Carolene Products* opinion, United States v. Carolene Products Co., 304 U.S. 144 (1938), rightly famed for other reasons, *see* text at note 84 *infra*, says that "[t]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *Id.* at 153.

78. *See* McDaniel v. Paty, 435 U.S. 618, 629 (1978).

generally need not consider the external effects of their decisions, at least not for the purpose of our assessment of their rationality.

If we simply transposed this individual model to the legislature, we would label the typical legislative balance "rational" merely because the legislature produced it. But we do not share any assumption about the integrity of the legislative choice comparable to our individualistic assumption. Legislatures are valued as a means for translating individual values into social decisions, not as ends in themselves. And it is presumably the values of *all* its members, not just some, that the legislature is supposed to weigh in striking its balance.

The individual legislator acting rationally can be expected to give predominant weight in casting a vote to the costs and benefits resulting to himself.[79] The mechanism by which he typically is forced to take account of the costs and benefits to others is the requirement of a majority vote to pass legislation. But this mechanism still leaves the real possibility that legislation will fail to account for its effects on any minority that remains unreconciled to it. If the net cost to the minority is substantially greater than the net benefit to the majority, a spectator outside the process might well conclude that the result was an irrational balance of costs and benefits.

Of course, the external spectator will have no ready way of comparing the value of the burdens to the minority with the value of the benefits to the majority. This means no more than that ascribing irrationality to legislative actions must be a matter of judgment, not science. That a conclusion of legislative irrationality is a matter of judgment may counsel caution in drawing the conclusion, but it does not make the conclusion meaningless. On occasion we may call an individual's cost-benefit balance "irrational" even though he has decided that it is satisfactory to him.

There is a more serious objection to judicial judgments that burdens imposed on a minority are irrational in light of benefits produced for the majority. The courts confront issues one at a time, but the legislative process is a dynamic one in which issues are not necessarily addressed discretely. In their important work on the translation of individual choices into governmental decisions, Buchanan and Tullock[80] stressed the role of "logrolling," or vote trading, as a means of giving expression to intensity of feeling about issues in the legislative

79. At this point I am treating the legislature as a device for translating the value choices of its members. Actually, legislatures are valued largely as mechanisms for translating citizen preferences into social choices. I will occasionally advert to this complication in this section, but I will treat it more fully in Part III. For present purposes it should be assumed that legislators' preferences have been formed by satisfactorily taking their constituents' preferences into account.

80. J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962). *See* D. TRUMAN, THE GOVERNMENTAL PROCESS 368 (1951).

process. In considering one legislative action a court may not know that those burdened by it obtained in exchange benefits from some other legislative action.

While the logrolling phenomenon also counsels caution in judicial conclusions of "irrationality," for several reasons it does not discredit the process. First, legislators are seldom elected for their trading ability. In this era of television, for example, a persuasive visual image can be more decisive in elections than the verbal persuasiveness that surely determines the outcome of many vote trades. The electoral process thus provides no systematic way to reward those who excel at trading.[81] This limits the scope of vote trading, and makes it inadvisable to assume that beneficial trades are occurring systematically.

Second, the majority vote rule limits the need for vote trading. Any time there is a minority on a legislative issue, that minority will not have received a sufficient legislative quid pro quo to have caused it to vote with the majority. The minority may have received something for a willingness to vote with the majority if its vote should prove to have been needed, or it may have benefited by a trade among three or more bargainers.[82] More likely, however, it will have received nothing because the majority vote rule made its votes unnecessary.[83] Thus, if the court can identify the voting minority on a piece of legislation under review, it can be reasonably certain that *that* minority did not receive compensation elsewhere in the legislative process for the burdens it perceived in the legislation.

Third, the burdens the court will consider will be burdens to citizens or groups of citizens, not directly to the legislators who voted.

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81. Contrasting the vote "market" with a reasonably free economic market further reveals the limited efficacy of the former. Vote trading is hemmed in by ill-defined but powerful ethical constraints. Legislative bribery is not only unethical but illegal. As a result, there is no common unit of exchange playing the facilitating role of money in the private economy. There is no law of entitlement to votes comparable to private contract law. Thus, "deals" are seldom reduced to writing and must usually remain ill-defined. There is no other market in which to trade the vote as there are a multitude of such markets in the world of private exchange. And there are severe time constraints on any trade. With the help of money a private trader can delay using the proceeds of a deal for years or even generations. With turnover in legislators added to all the other limitations, unless a trade is made in a short time frame the opportunity will likely be lost.

82. *See* Michelman, *Property, Utility and Fairness: Comments On The Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1180 n.30 (1967).

83. The majority vote rule also encourages coalitions that will agree usually to vote together, so that its members can minimize the trades they have to conduct with those outside the coalition. Considerations such as these led Buchanan and Tullock to conclude that the majority vote rule was used essentially to minimize the problems of reaching agreement. But they insisted that it leaves the real possibility that the substance of legislative actions will impose undue costs on a minority. Buchanan and Tullock's is an unusual version of a contract theory of the legitimacy of government. Other contract theories, however, similarly stress the important role of unanimous consent in governmental legitimacy, albeit usually at only a theoretical or hypothetical stage. *See, e.g.*, J. RAWLS, A THEORY OF JUSTICE 141 (1971); Michelman, *supra* note 82, at 1173, 1180.

Where vote trading occurred, legislators may have traded the interest of one constituent group for that of another. Yet the realism about the political process that Linde and others encourage must acknowledge that some citizens have so little say in the legislative process that their interests will be effectively given no weight at all. This may be because they lack money, cohesiveness, or are few in number. Or it may be because they lack the right to vote, as do children and the incarcerated. While a court may have difficulty determining the give-and-take of the legislative process, it will usually have a very good sense which persons or groups lack effective political power.

Considerations such as these may have motivated Justice Stone's famous suggestion that the courts might show special solicitude for "discrete and insular minorities."[84] Such minorities may well have little legislative power. There are, however, other, noninsular minorities that, in part because they are dispersed or just too small, have essentially no legislative power.[85] Many of the Court's interventions in the name of the rationality requirement have been on behalf of just such politically helpless interests.[86] When a court sees that the burden of legislation falls upon such individuals or groups, it can proceed to judge the rationality of the legislative balance without fear that it may upset an element of a legislative compromise it cannot view in its entirety.[87]

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84. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

85. It is easy to overlook the fact that some minorities have essentially no say in the legislature at all. *See, e.g.*, Sandalow II, *supra* note 1, at 1192.

86. *See, e.g.*, United States Dep't of Agriculture v. Moreno, 414 U.S. 524 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969) (alternative holding); Levy v. Louisiana, 391 U.S. 68 (1968); Rinaldi v. Yeager, 384 U.S. 305 (1966); Wieman v. Updegraff, 344 U.S. 183 (1952). *See also* Yick Wo v. Hopkins, 118 U.S. 358 (1866). *But see* Dandridge v. Williams, 397 U.S. 471 (1970).

87. Judicial concern with costs, benefits, and alternatives does not define either the weight to be assigned to specific effects or the stringency of the review of the legislative decision. Rationality as a characterization of what is required of legislative action suggests a great measure of legislative leeway. Still, it is not self-defining and blends incrementally into more stringent standards. Alternative formulations of the rationality requirement use "reasonableness" or "arbitrariness" or other similar words to express what is in issue, sometimes suggesting different shades on the stringency spectrum. *See* note 2 *infra*.

Although the Court's inclination in the 1950's and 1960's to avoid "rationality" as a basis for a finding of unconstitutionality left the word almost devoid of content for a time, this did not allow the Court to avoid cost-benefit balancing. Instead, the weighing was forced into the mold available. Cost-benefit concerns were turned into questions of whether the more or the less stringent of the two polar standards was to be applied. Thus emerged the fundamental rights branch of the compelling state interest test. There were seemingly endless debates about whether particular private interests were "fundamental" and whether particular public interests were "compelling." *See, e.g.*, Comment, *The Evolution of Equal Protection: Education, Municipal Services, and Wealth*, 7 HARV. C.R.-C.L. L. REV. 103 (1972). In part, these resulted from the awkwardness of pushing cost-benefit considerations, quintessentially matters of degree, into a choice of kind between two tests. In part, however, they resulted from a felt need to enhance the importance of certain interests beyond simply shielding them from "irrational" interference. For a treatment of

II

GIVING MEANING TO THE RATIONALITY REQUIREMENT: THE LEGITIMATE PURPOSES LIMITATION

Thus far in discussing the rationality judgment I have assumed that the legislative means were being tested against the actual or realistically assumed legislative purpose. To the extent the legislative purpose was fulfilled, I assumed that a "benefit" was obtained to be balanced against any harm done in the process. On these premises a rationality inquiry is meaningful, and requires no assumption that individual legislators may be "irrational."

The rationality requirement, however, does not allow consideration of merely any legislative purpose. It limits the purposes that may be considered to those which are "legitimate." To the extent the legislation is adopted in pursuit of illegitimate ends, those ends are unavailable to justify the means. If some illegitimate ends are accomplished, moreover, that fact may presumably then be placed on the burden side of the rationality scale to be balanced against whatever, if any, legitimately sought benefits are also accomplished. Before examining more closely the legitimate purpose limitation, we need a clearer notion of the meaning of legislative "purpose."

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voting rights cases, see Comment, *A Case Study in Equal Protection: Voting Rights Decisions and a Plea for Consistency*, 70 NW. U.L. REV. 934 (1976).

The increasing disenchantment with two-tiered analysis in recent years is largely understandable because of its inability to accommodate an infinitely variable balance of costs and benefits. One difficulty with a return to rationality as a general test is its awkwardness as a vehicle for special constitutional status of certain human activities.

Sometimes the Court purports to invoke "constitutional" values as part of the rationality calculus. *See, e.g.*, Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974). As a matter of common usage of the word "rationality," however, "constitutional" values would seem irrelevant to the judgment. An interest might be accorded constitutional protection in part because it is important in the minds of people. The Court has usually taken the position, however, that an interest does not obtain special constitutional protection just because it is important. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30 (1973).

Conversely, an interest might be accorded quite specific constitutional protection even though its infringement would not be viewed as irrational. There is no felt need to justify the high degree of protection we extend to free speech on the ground that any other course would be irrational. *See, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1976).

In fact, the Court often balances costs and benefits, applying a standard more strict than the rationality requirement when the interests burdened have less obvious "constitutional" status than freedom of speech or of the press. In Roe v. Wade, 410 U.S. 113 (1973), for instance, the Court struck a balance of interests in which the woman's privacy was given more weight than the Court was willing to assign it simply in the name of the rationality requirement. Still, there is no obvious line between balancing in the name of rationality and in the name of a more stringent standard. The Court has groped recently for formulations to express a higher degree of protection for some values. *See* cases cited at note 34 *supra*. But on occasion the Court also uses the language of rationality when it is clearly employing a more stringent standard of review.

A. Defining and Determining Legislative Purpose

The concept of "purpose," even more than that of rationality, presumes individual intelligence. Legislative "purpose" is a figure of speech that obviously draws on the fact that individual legislators have "purposes" they seek to pursue through legislation. By imputing the purpose of one person to another engaged in a common enterprise, legislative purpose can be understood as a function of the individual purposes of the legislators who voted for a piece of legislation and of others whose lead they followed.

First, however, we must look more closely at the motivations of individual legislators. Each member of a legislative majority will typically have had a "goal" in mind when casting his vote. Linde objects to an "instrumentalist view of the law" that "assumes that a law is always a means to an end . . . ."[88] Instead, he argues that many laws are produced by a legislative "sense of the fitness of things, not an instrumental aim."[89] But at one point Linde defines "goal" as "identification of a preferred future,"[90] and this definition is broad enough to encompass both noninstrumentalist values and instrumentalist aims, if indeed there is any difference between the two. A legislator's "preferred future" in voting to exclude billboards from interstate highways may be safer highways, but it may also be aesthetically pleasing highways.

A second aspect of a legislator's state of mind in a working definition of his "purpose" in voting for legislation is his set of background beliefs and attitudes. These will help shape his conception of a preferred future, but they will often do so without entering any conscious process of goal formation. The legislator voting for a state lottery, for instance, may do so with the goal of raising state revenues to finance schools. But he may bring to the vote as part of his general philosophy a feeling that people generally should be allowed to do whatever they want unless there is some substantial evidence that the activity is harmful to others. This background attitude will make him less resistant to the lottery proposal, but it will not necessarily enter into his conscious formulation of a preferred future. Obviously, the line between goals and background attitudes will not always be a clear one, but at the extremes they are distinguishable aspects of a legislator's mental state contributing to his vote. His vote in an important sense may be the product of his background attitudes but he is unlikely to have "considered" any particular legislation as a means to "accomplish" them.[91]

88. Linde, *supra* note 3, at 204.

89. *Id.* at 211.

90. *Id.* at 223.

91. *See* Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976) [hereinafter cited as Brest II]. A background attitude

An individual legislator's "purpose" in this expansive sense may be quite complex. And his "goal" may often be to please a governor or President, a fellow legislator or legislative leader, or one or more constituents. It may frequently have little to do with the societal results the legislation was likely to bring. But in that case it seems appropriate to attribute that other person's purpose (including any purpose attributed to him) to the individual legislator.[92] All involved are likely to recognize the legislation as a separate enterprise on which they are jointly embarked. Attribution of purpose is a common device in the law when two or more persons embark on a joint enterprise, and it seems essential if we are to reach any useful understanding of the "purpose" of a legislative enterprise.

A legislator who compromises with other legislators while negotiating on legislation he will eventually favor can be said to adopt as a part of his purpose the similarly qualified purposes of those with whom he reaches agreement. The purpose of each is redefined by the process of compromise. The result of this process may be two or more groups of legislators voting for a statute with different purposes, real and attributed. But if the legislation represents a compromise among all voting for it, a "purpose" that is an amalgam of real and attributed goals and background attitudes of all the majority legislators can be ascribed to each one. In the latter case, that amalgamated purpose can be treated as the "purpose" of the legislation. If there were two or more groups, the votes of one may have been sufficient to pass the legislation. In such a case it seems appropriate to call that group's "purpose" the legislation's "purpose." If the votes of more than one group were necessary to pass the legislation, the "purpose" of each group in the majority should be treated as a "purpose" of the legislation. In this way, it is possible to conceive a complex purpose (or a complex of purposes) without which the legislation would not have passed.[93]

This conception of statutory purpose may seem to make its deter-

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of, say, prejudice against blacks or hippies may make a legislator insensitive to burdens imposed on that group and thus may enhance the chances of an "irrational" balance in the sense explored in Part I. This Part explores an independent way in which illegitimate purposes—including background attitudes—may lead to a conclusion of unconstitutionality under the rationality requirement.

92. Attribution of constituent purposes is likely to rest less easily than attribution of another legislator's purposes. But it could well be that all legislators voted as they did with the simple preferred future as one where their constituents were pleased. Only the constituents would then have had "goals" of the kind we usually associate with legislative purpose.

93. Professor Ely seems to identify the legislative "purpose" with that held by a "majority"—apparently of the legislators. Ely, *supra* note 3, at 1268. This seems clearly wrong. It is, however, conceivable that one small group's votes could be disregarded because the votes of two or more other groups were both necessary and sufficient. The problems of proof to be addressed shortly make this possibility of little practical significance.

mination impossible. In practice, however, the process of ascertaining legislative purpose is considerably less bewildering than it may seem. Most legislation is shaped by only a few legislators. The device of imputed purpose allows legislative purpose to be defined by the purposes of those few. The common use of committee reports or statements by sponsors of legislation is justifiable on this basis. The legislation itself may state one or more purposes. Even if none is stated, given what will typically be the common understanding of its social and economic context, the words of the legislation will be highly probative not only of legislator goals but even of background attitudes.[94]

Often there will still remain substantial uncertainty about the legislative purpose. Even a legislative statement of "purpose" may be incomplete and may well be misleading. Courts regularly cope with decisionmaking under uncertainty, however, by doing the best they can with the data available. The very question of legislative purpose is regularly resolved when courts engage in statutory interpretation, with no unusual concern about the uncertainty of the answer.

It is argued, nonetheless, that more is involved when the issue is constitutionality, that there "the stakes are sufficiently high . . . to eschew guesswork."[95] Perhaps this only expresses a concern that legislation not lightly be found unconstitutional. But such a concern should not be limited to decisions turning on questions of legislative purpose. Assignment and definition of the burden of proof are appropriate devices by which legislative action can be given the benefit of the doubt as to an operative fact. But there are other devices, and the rationality requirement is one of them. Its structure can in part be seen as a way of coping with uncertainties that often beset inquiry into legislative purposes. If a court cannot confidently determine the legislative purpose, it can test the legislation for rational service of any plausible purpose. Taken to an extreme this could lead to Justice Harlan's (or an even more severe) form of fictionalization of "purpose."[96] But if uncertainty about purpose justifies flexibility in its definition, the flexibility should not be extended to allow use of a "purpose" confidently determined to have played no operative role in the legislation.

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94. *See generally* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977).

95. United States v. O'Brien, 391 U.S. 367, 384 (1968). One commentator, noting a Court split on the question of legislative purpose in Schlesinger v. Ballard, 419 U.S. 498 (1975), reflects a similar predisposition by asking "whether invalidation of legislation on constitutional grounds should turn on an inquiry into legislative purpose, when the Court itself can split six to three as to the nature of the purpose." Dixon, *The Supreme Court and Equality: Legislative Classification, Desegregation, and Reverse Discrimination*, 62 CORNELL L. REV. 494, 528 (1977). It is unclear to me why a Court split on legislative "purpose" is more alarming than a split on any other operative constitutional question.

96. *See* text accompanying notes 41-43 *supra*.

Again, time blurs the picture. Initially, legislation may have been passed with one purpose or set of purposes, but may remain on the statute books at any given time for another. In this sense, the "purpose" of legislation may change the moment it is passed, and it may fluctuate constantly with changes in the goals and background attitudes that motivate succeeding generations of legislators not to repeal or alter the legislation. It is commonly thought, for instance, that the 55-mile-per-hour national speed limit was enacted to save fuel but was subsequently retained to save lives. And the Sunday closing laws approved in *McGowan* may have been passed initially for religious purposes but retained for the health and recreational purposes on which the Court relied.

If the purpose for nonrepeal is known, the legislation can be tested against it. A statute originally passed for a legitimate reason but retained for a forbidden one currently accomplishes what the Constitution is understood to disapprove. Conversely, to strike down legislation which was passed for an illegitimate reason but which now serves a legitimate one would be senseless, at least if the legislation would simply be reenacted to achieve the legitimate purpose.

The time factor helps to explain judicial willingness to consider "purposes" for particular legislation that may not have originally motivated it. But it only explains a willingness to consider purposes that there is some substantial reason to believe have actually motivated nonrepeal.

It will, however, seldom be possible to identify a contemporary legislative purpose that differs from the original one. By definition, the "purpose" must be a set of legislator goals and background attitudes without which the legislation would be repealed or altered. But that particular legislation on the books is not repealed or amended does not show that there is any current legislative purpose yielding that result. Nonrepeal may be the product of legislative indifference or inertia. Further, nonrepeal is a nonact which need not leave any trace of its motivation. Since nonrepeal requires no vote, the justification for imputing the purpose of one legislator to another for nonrepeal purposes is also considerably weaker than in the case of original passage.

In the face of these difficulties, it seems most reasonable to employ a strong but not irrebuttable presumption that a statute's original purpose remains its contemporary purpose. Longstanding and consistent judicial or administrative interpretation of a statute may alone provide sufficient evidence of contemporary purpose.[97] Where these exist in

97. *Cf.* Trimble v. Gordon, 430 U.S. 762 (1977), where the Court confined itself to considering the "purposes" ascribed to a statute by the state supreme court.

combination with evidence of prominent public discussion of the statute's effects and legislative committee reports citing these effects and the longstanding interpretation as reasons for nonrepeal, it would seem inappropriate to adopt the original purpose either to interpret the statute or to test it under the rationality requirement.[98] The longer the time since original passage, the stronger the inference that the original purpose may have been displaced.[99]

There is, I think, a fundamental reason to face the problems of defining and ascertaining legislative "purpose" for constitutional law. It is simply chimerical to search for constitutional constraints that ignore legislative purposes, for fear of the "purposes" of those wielding public power inspired and continues to sustain much of our constitutional law.

The fifteenth amendment, for example, is explicit in its concern with official motivation: "The right of citizens . . . to vote shall not be abridged by the United States or by any State on account of race, color, or previous condition of servitude." The constitutional prohibitions on bills of attainder[100] are usually understood as prohibitions of certain legislative states of mind.[101]

A number of more familiar constitutional constraints also have arisen, at least in part, from concerns about official purposes. The first amendment protections for speech and press were surely motivated in part by a concern that those wielding public authority would *seek* to suppress dissenting expression. The religion clauses of the first amendment reflect concerns that legislatures would *want* to stifle free exercise or establish some religious belief. And the commerce clause expresses concern that state legislatures will be drawn toward "economic protectionism."[102]

The Supreme Court has recently held that a finding of racial discrimination in violation of the fourteenth amendment requires a find-

98. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 348-49 (1978) (opinion of Brennan, J.); Monell v. Department of Social Serv., 436 U.S. 658, 700 n.65 (1978).

99. The case law seldom directly addresses the question of whether an original statutory "purpose" can ever be displaced in the face of sufficiently strong evidence of a different nonrepeal purpose. For a recent discussion of the relevance for statutory interpretation of some of the factors discussed in the text, see SEC v. Sloan, 436 U.S. 103 (1978).

100. U.S. CONST. art. I, §§ 9, 10.

101. In Flemming v. Nestor, 363 U.S. 604 (1960) (*see* text at note 41 *supra*), after pronouncing actual purpose irrelevant in applying the rationality requirement, Justice Harlan considered the claim that the legislative action there was "punishment" and hence a bill of attainder. While rejecting the claim, he acknowledged that the question of whether legislative action was punishment was a matter of "punitive intent." *Id.* at 615.

102. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

ing of discriminatory intent.[103] While debate continues about constitutional tests turning on effects,[104] it is surely impossible—and inappropriate—entirely to separate the constitutional prohibition from the concern that legislators will try to discriminate on the basis of race. A great deal of governmental action likely has racially disproportionate impact. It would be neither workable nor desirable to forbid all legislation with such effects or even to demand extraordinary justification for all such legislation. If members of racial minorities stochastically obtain benefits and suffer detriments as one or another piece of legislation is passed without attention to its racial impact, they are obtaining, not being deprived of, equal protection of the laws. To forbid all legislation that disadvantages them would give them the gains from political bargaining without the losses. This would be so regardless of the degree of the racially disproportionate impact or the importance of the interest affected. Thus, even if blacks attend few symphony concerts, public subsidization of symphony orchestras can hardly be thought to offend the constitutional prohibition against racial discrimination, nor could a decision made on nonracial grounds to spend funds to cure measles rather than sickle cell anemia, even if blacks suffer disproportionately little from the former and greatly from the latter.

Constitutional sensitivity to racial discrimination clearly arises from the knowledge that much in our society today is attributable to a legislative pattern characterized first by slavery and then by continuing racial animosity. A purpose to disfavor racial minorities, prevalent as it has been, makes it likely that the costs of present legislative action will be visited disproportionately on the disfavored groups. This consideration justifies basing some constitutional judgments about legislation directly on racially discriminatory effects, or employing such effects to trigger a requirement of extraordinary defense of legislation. This should not obscure the fact, however, that without concern about past and present intent, racially discriminatory effects of legislation would be quite innocent.

Indeed, if the constitutional command of equal protection is to mean anything in contexts other than the racial discrimination cases, it seems inevitable that it would mainly require evenhandedness in pursuit of purposes. The apparent alternative is a prohibition of unequal results. Even if we could figure out what that would mean, there is no particular reason to think that we would want to pursue it, except perhaps in matters fundamental to civilized existence or to democratic so-

103. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). *See also* Personnel Adm'r v. Feeney, 99 S. Ct. 2282 (1979).

104. *See, e.g.*, Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. REV. 36 (1977).

ciety. The guarantee of equal protection, in other words, can most usefully be understood against a background of concern that the *temptations* to unequal protection are great.

Judicial concern with legislative purpose in constitutional decisionmaking often manifests itself by indirection. The "suspicion" of suspect classifications in two-tiered equal protection, for instance, is in part[105] the suspicion that a legislative purpose may have been to disfavor a traditionally disadvantaged group. Such indirection has its place. In this instance, it acts as a kind of presumption of forbidden purpose and, for a whole class of statutes, avoids the need for repeated inquiry as to purpose. The requirement that a compelling state interest be shown is mainly an opportunity to rebut the presumed illegitimate purpose.[106]

No doubt the indirection is also partly a product of judicial discomfort in relying directly on considerations as elusive as legislative purposes. Understanding this, and even empathizing with the Court's dilemma, however, should not obscure the fact that concern with legislative purposes is securely woven into the fabric of our constitutional law.

B. Standards of Legitimacy

The central problem with the legitimate purposes limitation in the rationality requirement is determining standards of legitimacy. It is relatively easy to agree about the constitutional illegitimacy of some legislative purposes, *viz.*, those of which the words of the Constitution explicitly or by reasonably clear implication disapprove. We have already noted the constitutional illegitimacy of attempting to establish a religion, interfere with the free exercise of religion, or suppress speech because of its content. In addition, the constitutional illegitimacy of a legislator's pursuit through his vote of a design to enslave a group of persons guilty of no crime or of a scheme to deprive criminal defendants of a jury trial would be beyond dispute. In practice it is clear that the Court has gone beyond such a limited list both in enforcing the rationality requirement and in other constitutional holdings. What remains quite unclear is just how far the Court has gone and is willing to go, and by what standards it will be guided.

The form of the rationality requirement contributes to the lack of

105. In part it may be used to remedy the continuing effects of past racial discrimination regardless of present motivation. In either case, the reluctance of Justices Brennan, White, Marshall, and Blackmun in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 358-59 (1978), to test the "racial" discrimination there under a standard of "mere" rationality is at odds with the view of "suspect" classifications presented in the text.

106. *See* Brest II, *supra* note 91, at 15 n.65; *cf.* Hicklin v. Orbeck, 437 U.S. 518 (1978).

clarity. While the requirement allows the Court to consider one or more legislative "purposes" and label any of them illegitimate,[107] it does not force such explicit attention to the legitimacy issue. Under the requirement the Court can easily shift the subject of constitutional inquiry from legitimacy of purpose to rationality of means by failing to consider a purpose that it would find illegitimate and considering instead a legitimate variant. If the variant is too far from the actual purpose, the means chosen can be expected more plausibly to appear as irrational. Upon closer examination, then, some findings of "irrationality" might more sensibly be understood as resting on unstated conclusions of illegitimacy of purpose.

In *Levy v. Louisiana*,[108] for instance, the Court found it irrational for the state to deny illegitimate children the right to recover for wrongful death of their mothers while according such a right to legitimate offspring. The Court apparently tested the classification against the purpose of compensating for harm.[109] The distinction was obviously irrelevant to this purpose and hence the Court could find the discrimination "invidious."[110] But the highest state court to consider the question had characterized the distinction as "based on morals and general welfare because it discourages bringing children into the world out of wedlock."[111] One might doubt that the statute actually operated to discourage illegitimate births, or could reasonably have been predicted to, but the Supreme Court, after noting this purpose in passing, simply ignored it in the discussion leading to its conclusion. More importantly, the Court did not consider the possibility that legislators may have harbored a background attitude that illegitimate children are unworthy. With this as a component of the statutory purpose, it would be hard to pronounce the means chosen irrational. The Court's failure to weigh such a background attitude can probably be best interpreted as a dismissal of it as illegitimate.[112]

The Court also juggled its analytical tools in *Reed v. Reed*,[113]

107. *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 56 (1973); Shapiro v. Thompson, 394 U.S. 618, 629, 633 (1969).

108. 391 U.S. 69 (1968).

109. *Id.* at 72.

110. *Id.* at 71, 72.

111. *Id.* at 70.

112. It could be that legislator disapproval is of the illegitimate activity of the parents rather than of the children. *See* Matthews v. Lucas, 427 U.S. 495, 505 (1976). The Court has never been willing to label such disapproval "illegitimate." *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972). Some of the cases involving discrimination against illegitimates may thus be pure examples of cases where the actual legislative purposes are perfectly legitimate, but the cost-benefit balance is deemed irrational in light of the harm to the children. Such a conclusion would not be at all surprising in light of the political powerlessness of illegitimate children. *See* text accompanying notes 84-87 *supra*. *Cf.* Parham v. Hughes, 99 S. Ct. 1742 (1979).

113. 404 U.S. 71 (1971).

where Idaho was held to have violated the rationality requirement by giving statutory preference to males over females as administrators of estates. The opinion is highly conclusory, but the Court seemed to view the basic statutory objective as effective administration of estates. The Idaho Supreme Court had reasoned, however, that preference for males would help to resolve controversies over who should be the administrator of an estate. The Court characterized this objective as "not without some legitimacy."[114] But it never considered the possible background attitude that women as a class were less suited to the worldly task of estate administration. In light of subsequent decisions, it seems clear the *Reed* Court felt that such a background attitude would be illegitimate.[115]

Such opportunities for skirting the legitimate purpose question may partly explain the rationality requirement's appeal. If the Court has some sense that a full articulation of legislative purpose would uncover illegitimate elements, it may prefer not to pursue the inquiry. It has been suggested that "a finding of impure motive sufficient to avoid an act of a legislature impugns the essential integrity of a coordinate branch of government."[116] While this may attribute to legislators more fragile sensibilities than is warranted, it does seem that the Court prefers to avoid the "element of insult"[117] in a finding of illegitimate legislative purpose.

In addition, the logical conclusion from a finding that legislation would not have passed had it not been for an illegitimate purpose would be that the legislation is unconstitutional. But, as we have seen, the legislative purpose may be difficult to ascertain in all its detail. If the legislators suspect that their purpose may be in any sense illegitimate, evidence of the illegitimate component may be scant. The rationality requirement provides a vehicle by which the Court can avoid specific findings that legislation is a product of illegitimate purpose while insisting that legislation be justifiable by reference to a legitimate purpose. In this way the attenuated nexus requirement of mere rationality compensates for the fragile basis on which the legislature's actual purpose may be reconstructed.

Despite the fragmentary direct evidence, it is not difficult to appreciate a good deal about the Court's standards of legitimacy that go beyond constitutional text and history. It is not difficult because elements

114. *Id.* at 76.

115. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

116. *Developments*, *supra* note 57, at 1093.

117. Brest I, *supra* note 48, at 130.

of those standards are widely shared, even by many of the most forceful critics of the rationality requirement.

Hans Linde, as we have seen, objects to the instrumentalist form of justification that he thinks the process of judicial review imposes on legislative action. For Linde, legislation is legitimately motivated not only when aimed at a public policy goal or set of goals, but also when it expresses "a sense of the fitness of things,"[118] as that widows or the disabled should be treated favorably.[119] He sees nothing infirm in legislative goals that "are merely sentimental, or parochial, or old-fashioned."[120] He suggests that it is both commonplace and proper for legislation to be intended "simply to favor one interest at the expense of another."[121] At the same time, however, Linde approves the use of equal protection to exercise "strict scrutiny" of suspect classifications, which he characterizes as classifying people by "who they are rather than what they do."[122] "The suspicion," he says,

> is suspicion of prejudice—not simple prejudgment based on ignorance and mistaken notions of facts, but invidious prejudgment, grounded in notions of superiority and inferiority, on beliefs about relative worth, attitudes that deny the premise of human equality and that will not be readily sacrificed to mere facts.[123]

The distinction that Linde advances between legislation founded in "prejudice" and that based on a "sense of the fitness of things" or on "merely sentimental, or parochial, or old-fashioned" concerns is certainly not based on constitutional text, nor is it otherwise self-defining. His elaboration of what constitutes prejudice is not in itself revealing. Yesterday's sense of fitness may be today's prejudice, as an early case interpreting the privileges and immunities clause of the fourteenth amendment demonstrates. There the Supreme Court rejected a challenge to an Illinois practice of excluding women from the practice of law.[124] Three concurring Justices of the Supreme Court could write of the role of women:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repug-

118. Linde, *supra* note 3, at 211.
119. *Id.* at 210.
120. *Id.* at 221.
121. *Id.* at 212.
122. *Id.* at 201.
123. *Id.* at 201-02.
124. Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872).

> nant to the idea of a woman adopting a distinct and independent career from that of her husband.
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> . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.[125]

Now discrimination on the basis of sex "is forbidden . . . when supported by no more substantial justification than 'archaic and overbroad' generalizations, . . . or '"old notions"' . . . that are more consistent with 'the role-typing society has long imposed,' than with contemporary reality."[126]

Whether discrimination against homosexuals (an example of current debate) or aliens (an example long posing constitutional problems) is based on permissible value judgment or impermissible prejudice is a question for which Linde's scheme gives no answer. He apparently thinks the Supreme Court correct in refusing to accede to a legislative attempt to disfavor "hippies,"[127] but he does not explain why this was legislative "prejudice" rather than a "sense of fitness." There is no instruction in constitutional text, constitutional history, or Linde's definition of "prejudice" that will tell us on which side of the line appropriately to place a hostile attitude toward large welfare families that may have motivated the discrimination in *Dandridge v. Williams*.[128] Linde's distinction is not meaningless, but it depends on judgments that are not self-evident about the legitimacy of legislative goals and of legislative background attitudes.

Richard Posner, despite his insistence on "realism" in understanding the role of power group struggles in the political process, also displays some softness on the issue of court authority to disapprove legislative purposes undirected by a scheme of values derived from constitutional text or history. As a note to his rejection of any general requirement that legislation be in the "public interest," Posner says, "there may be extreme cases of discriminatory state action not involving racial or ethnic criteria but so palpably inconsistent with 'the equal protection of the laws' as to be unconstitutional, such as forbidding left-handed people to obtain drivers licenses in order to reduce automobile pollution."[129] All Posner may be saying here is that the Court has a useless authority to declare unconstitutional those acts that a legislature

125. *Id.* at 141 (Bradley, J., concurring).

126. Califano v. Goldfarb, 430 U.S. 199, 207 (1977). At the same time, the Court accepts gender-based discrimination with a benign (usually remedial) purpose. *See* Califano v. Webster, 430 U.S. 313 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975).

127. Linde, *supra* note 3, at 212-13. *See* United States Dep't of Agriculture v. Moreno, 413 U.S. 508 (1973).

128. 397 U.S. 471 (1970).

129. Posner, *supra* note 3, at 29 n.56.

would, quite literally, never pass. But if he means to reserve a real power for the Court, it is instructive to inquire why the example he gives is "extreme."

Linde and Posner share the view that much legislation is simply and appropriately intended to favor one interest at the expense of another. One would have to be blind to the realities of political life to deny what Tussman and tenBroek called "the pressure situation in which legislatures operate." The appropriateness of automatic approval of the results of such pressure is, however, another matter.

A hypothetical example should help make the point. Assume that A and B are the country's only two manufacturers of electric cars, recently in the public eye because they do not contribute to pollution of the air. A is the larger of the two, and Ms. A, the president of A, is an important constituent of legislator X. If X sponsors legislation to help A and B—a tax credit for certain equipment used in the manufacture of electric cars, for instance—he may characterize it as a measure to deal with air pollution. His real purpose, however, may simply be to favor his constituent Ms. A. The inclusion of B is, under this assumption, to provide a cover—what Posner calls a "figleaf"—to hide the real purpose.

But what if the legislation aids only A? It might, for instance, extend the tax credit only to large manufacturers of electric cars, with the cutoff just under A's size. The air pollution figleaf might then be a bit transparent as cover for the motivation. Assume Ms. A came to X with a proposal for a credit for A only, and urged its passage simply as a personal favor. Assume further that X introduced the necessary legislation, touting it as a favor to Ms. A, that it was passed with a preamble announcing this purpose, and then defended against constitutional challenge by B (or others) on the ground of its rational relationship to the purpose of extending a favor to Ms. A. Few will doubt that the legislation would fail the rationality requirement; the purpose would be found illegitimate.[130]

The conclusion of illegitimacy is not changed if B is included within the legislation's favor but the legislation is still advanced as a

130. When the Supreme Court found unconstitutional the statutory exemption for the American Express Company in Morey v. Doud, 354 U.S. 457 (1957) (*see* text at notes 24-27 *supra*), it may have been disapproving what it perceived to be just such legislative favoritism. *Morey*, however, was probably not an appropriate case in which to reach such a conclusion. There was apparently good reason to believe that the American Express Company posed less concern to the legislature than did any of the companies not exempted. *Morey* was expressly overruled in City of New Orleans v. Dukes, 427 U.S. 297 (1976), but the basis for its disapproval was not made clear. Perhaps it is stretching a point to read some of the language in *Dukes* as agreeing with the analysis in this footnote ("[R]eliance on the statute's potential irrationality in *Morey* . . . was a needlessly intrusive judicial infringement on the State's legislative powers." *Id.* at 306).

way to do a favor for A. Indeed, since this is not necessary to accomplish its only purpose, it could be argued the legislation then "wastes" public funds on B.

But the electric car case would never come to court burdened with such a record, whether or not B was included in the legislation's benefits. The state's lawyer, in arguing the case, would not rely on a purpose to aid A; X's colleagues would not have voted for legislation advanced on this ground and X would not have so advanced it. In all likelihood not even the original proposal to X from Ms. A would have been justified as a simple favor.

At each stage, legislation so motivated would have been couched in acceptable public policy terms—Posner figleaves. Here the public policy rationale would likely be the interest in clean air. This says something about legislative politics, to be sure, but also about legislative morality. A figleaf is a sign of shame, and shame here is brought on by a sense that the proposal—because of its purpose—pushes beyond the limits of legitimate legislative action.

Nor does the legitimacy question change if the purpose of the legislation is to do a favor for A and B. As before, the purpose would not be advanced simply as a favor, and no court would uphold it if it were. Professor Posner's left-handed drivers example is just the next step. It is not so much "extreme" as it is unrealistic. Right-handed drivers do not form a cohesive group in our society and hence would never be expected to lobby for the exclusion of left-handers and justify it in the name of reducing air pollution. But if right-handed drivers were a cohesive group with, in Posner's phrase, "superior ability . . . to manipulate the political process," the example might become realistic. If Posner means that in a world where legislatures could be imagined to discriminate against southpaws the hypothesized action would still be unconstitutional, then he too reserves to the Court authority uninstructed by constitutional text or history to disapprove legislative action based on impermissibility of purpose. And in this he clearly must be right.

Widely shared concepts of legitimacy in legislative activity will not tolerate legislation that does no more than favor one interest at the expense of another, whether the "interest" is that of an individual or of a group. Without announcing a comprehensive theory of legitimate legislative action, it does seem clear that unalloyed personal favor is beyond the present legislative pale—and that includes a restriction on left-handed drivers if motivated simply by a desire to give righties more driving room at the expense of lefties.

The typical legislative preference for one interest over another is not so simple. There are many purposeful transfers of wealth or well-

being that are accepted as perfectly legitimate governmental activities.[131] These all involve either perceived relative[132] "need" of the transferee or response to governmental "obligation." Social security, unemployment compensation, food stamps, and public assistance generally fall into the first category.[133] Veterans programs, farm subsidies, and subsidization of schools in "impacted" areas all have an element of the second.

There are also more traditional justifications for governmental action in an individualistic society. These are controlling or compensating for external costs of individual activities and creating and distributing wealth or well-being where public organization is more suited to the task than private. Regulating air pollution is by now the classic example of the first, and providing national defense of the second.

When governmental activity deals with external costs and benefits the result is usually a different distribution of wealth or well-being than would have prevailed in its absence. Wealth transfers responsive to need or governmental obligation, of course, are consciously intended to alter the preexisting distribution of wealth. Since almost all governmental activity thus has an impact on the distribution of wealth or well-being, those powerful enough to play a role take an interest and "lobby" for activity that will benefit them. Inevitably, wealth transfers will be sought by interested groups as ends in themselves. But "realism" in recognizing this does not make for legitimacy. Most legal as well as moral restraints, after all, are responses to real temptations.

If simple wealth transfers unresponsive to perceived "need" or "obligation" and not incidental to other legitimate governmental function were viewed as "legitimate," there would be no need for the air pollution "figleaf" in the left-handed drivers example. The justification for governmental activity in terms other than automatic obeisance to interest groups is *legislative* recognition that it is not legitimate governmental activity *simply* to favor one group at the expense of another.[134]

Professor Posner may well be insufficiently realistic in depicting

131. This was not always so. *See* Calder v. Bull, 3 U.S. (30 Dall.) 386, 388 (1798).

132. *See* Michelman, *supra* note 82, at 1182.

133. The perception will often be that the recipients belong to a class likely to be "needy" rather than that each recipient is himself "needy." It also seems that much "need" is assessed relative to the status quo. It is increasingly viewed as apropriate governmental activity to protect the reasonable expectations of groups or individuals (even if those expectations were not attributable to governmental causes). *See* City of New Orleans v. Dukes, 427 U.S. 297 (1976) (overruling Morey v. Doud, 354 U.S. 457 (1957)) (Court refuses to upset an ordinance that grandfathered the rights of longstanding vendors in the French Quarter of New Orleans). *But cf.* Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266, 273-74 (1936).

134. In upholding legislation in Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949),

the "characteristic product of a democratic . . . political system" as largely uninfluenced by concerns about legitimacy of the sort I have described. The sense of legitimacy must shape the legislative process somewhat, if only to produce a figleaf that will not crumble. In the electric car example, for instance, X will ask himself whether he can in good conscience make the proposal, either at all or without B included in its benefits. X's colleagues will be unlikely to accede to a proposal defended or defensible only in what are perceived to be illegitimate terms. B will be able to call on this sensitivity in either opposing the proposal or seeking inclusion in its favors. And the attorney for the state in any subsequent litigation will justify the legislation in terms of its public, not its private, purposes.

It may be that legislation appearing to be a simple wealth transfer without further justification actually represents a concession given in exchange for support of a clearly permissible measure. In that case, it could be argued that court disapproval will disrupt the results of freely bargained political trading. But the legislative context is one in which the public business is done, and this places severe restraints on the permissible currency for any political trading.[135]

There are both theoretical and practical objections to judicially imposed limits on permissible legislative purposes. The practical problems are apparent. Figleaves camouflaging legislative favoritism are abundant, and courts are understandably uncomfortable in peeking under them. The theoretical problems are at least as great. In important respects, "need," "obligation," and "external effects" are all matters of perspective. Whether need can be defined in relation to the status quo, whether governmental "obligation" arises because the government failed to stop a wrong, and how concrete and direct an impact must be to qualify as an "external effect" are some of the questions that impinge upon the contemporary legislative view of its own proper function. There is a very real possibility that a judge's view of "legitimate purpose" as informed by answers to such questions will vary from the one prevailing in society more generally.[136] Again, these problems counsel judicial caution in concluding that purposes are illegitimate. But they should not be mistaken for an acknowledgment that legisla-

the Court insisted on a justification for the legislation beyond the favor to the "insurance lobby" that plaintiffs urged had motivated it. *Id.* at 222-24.

135. It is clear, for instance, that any promise to exchange support on one measure for support on another would be unenforceable in a contract action. Of more direct relevance, a vote cannot be traded for cash, presumably even if that cash were then to be distributed to the recipient legislator's constituents. In similar fashion, a legislator cannot bargain for a simple wealth transfer to his constituents, even if it is accomplished by legislation.

136. The Court's stubborn adherence to an anachronistic vision of the American economy in the 1930's is a suitable example.

tures can legitimately favor one interest over another in an indiscriminate fashion.

This presents the Court with an inescapable dilemma. With the power to veto comes the burden of legitimating that which is not vetoed. Charles Black[137] and Alexander Bickel[138] noted the Court's function of "legitimating" legislative action. I have argued that concern with the legitimacy of legislative purposes is virtually inevitable in any system that resembles our constitutional law. Once the Court concerns itself with legitimacy of purpose generally, as it has with the rationality requirement, it faces the prospect of putting its stamp of approval upon pure legislative favoritism if it is unwilling to pronounce such favoritism illegitimate. In so doing, it would be legitimating a legislative authority almost all legislators and their constituents would deny they legitimately possess.

The substance of the rationality requirement is responsive to a recognition that the Court's information about legislative purpose often will be highly imperfect. But the requirement is also responsive to the Court's predicament in having to use elusive standards to particularize strongly sensed limits on the proper use of legislative power. The legislative measure need not be the best way to pursue a legitimate purpose, nor even a good way. It must only be a rational way.

To return to Professor Posner's example, it might make sense to improve air quality by cutting down on the total amount of driving. Getting the left-handers off the road would do the trick, but so would getting any group of comparable size not to drive, or getting some larger group to drive less. If there are clearly less costly ways to achieve the end or to spread the costs of immobility more evenly among those benefiting, or ways that are administratively easier than taking it all out on the lefties, then the means chosen may be an irrational way to pursue the goal. If the lefties are well known to be politically powerless, the Court can reach that judgment without fear of disappointing a bargained-for allocation of benefits and burdens.

If the real motivation for the measure was to transfer mobility from lefties to righties, this irrationality is not surprising. Having set out for one destination, even an individual could be expeeted to have chosen a route that is an irrational way to get to another. But let us suppose that left-handers were statistically shown disproportionately to drive in a manner that caused air pollution, and the legislature shrewdly hid its "get the lefties" purpose with an "air quality" figleaf. The measure would then appear less bizarre as a means to achieve its

137. C. BLACK, THE PEOPLE AND THE COURT 34-86 (1960).

138. A. BICKEL, *supra* note 14, at 29-32.

asserted purpose. If it did not appear "irrational," it would be upheld (at least under the rationality requirement) even if the legislative purpose was simply to benefit right-handers. In this way, the rationality requirement represents a concession to the reality of pressure group politics without capitulating to it.

It is sometimes difficult to confine the use of the flexibility built into the rationality requirement to service of the tasks that appear to justify it. Recall the Court's rationality decision in *Rinaldi v. Yeager*,[139] where New Jersey recovered the cost of trial transcripts from the earnings of incarcerated indigents.[140] The statute providing for the recovery was headed "Reimbursement," a fact the Court used to justify testing the legislative discrimination for its rational relationship to a "fiscal objective."[141] The Court's finding of "no relationship" to this objective was surely hyperbole since it was undenied that the measure did bring in money. More likely, the Court meant that New Jersey had not chosen a rational means to the fiscal objective, since the burden of payment, which must have been substantial in the context of a prison earnings program, was imposed on such a minor group of those benefited. And, as a result, it achieved the objective to only a minor degree.[142] With these factors added to the classificatory imperfection, a conclusion of the irrationality of the means used for the fiscal end seems plausible.

In this fashion the Court found the distribution of burdens and benefits from the reimbursement requirement an irrational way to accomplish a purely fiscal objective, given the alternatives. In the process, however, the Court failed to mention purposes which, in combination with the desire to recover some public expenditures, would have been much more difficult to dismiss as not rationally served by the statutory scheme. To take the most obvious possibility, some legislators may have wished to impose additional punishment on those indigents sentenced to prison. If this element of "purpose" is added to those the Court discussed, it is difficult to conclude that the statutory discrimination is an irrational means to accomplish the "purpose." But is also difficult to know by what standards such a purpose is thought

139. 384 U.S. 305 (1966).

140. *See* text accompanying notes 28-29 *supra*.

141. 384 U.S. at 309-10.

142. The burdened group was also one with essentially no political power. *See* text accompanying notes 84-87 *supra*. The Court suggested that the fiscal purpose might have been tempered by considerations of administrative convenience since it would be somewhat easier to collect the prison earnings of those in jail than the earnings of nonprisoners. But it rejected the substantiality of any such consideration, saying that "any supposed administrative inconvenience [in collecting from those not in jail] would be minimal, since repayment could . . . be made a condition of probation or parole, and those punished only by fines could be reached through the ordinary processes of garnishment . . . ." 384 U.S. at 310.

illegitimate. It is surely legitimate to impose incremental punishment on those convicted of a crime who are found appropriate for incarceration. That presumably is one of the things that incarceration accomplishes.

It is possible that the Court failed to consider a punishment purpose because the Justices never thought of it. The legislature's "reimbursement" label may have turned the Court's attention from other possible purposes. Indeed, the Court even may have had an accurate sense that the legislature would have been unwilling to announce any punitive purpose because of its own sense that punishment should be accomplished in more straightforward fashion.

It clearly does disservice to the complexities of the legislative process, however, to hold the legislature to the kind of unitary purpose that is typically stated in a legislative preamble or section heading. The *Rinaldi* result could probably have been more soundly grounded in a concern for integrity of the free transcript right than in the rationality requirement. Precisely because the structure of the rationality requirement allows manipulation of purposes, it often invites a court to provide simplistic characterizations of legislative purpose and thus to decide more in the name of "rationality" than can be justified by its theory.

III

JUSTIFYING THE RATIONALITY REQUIREMENT: SYMBOL AND SUBSTANCE IN DEMOCRACY AND LAW

The rationality requirement is an ungainly instrument for the Court to use in overruling legislative decisions. It provides vague substantive standards and deals with fluid substantive concerns. And it depends upon highly imperfect information with which to address those concerns. In the hands of judges appreciative both of its theoretical underpinnings and of its limitations, however, it can provide a basis for the exercise of a judicial veto power that is not only coherent but capable of evolving with standards of legislative legitimacy, societal evaluation of the importance of private interests and public goals, recognition of societal prejudices, and shifting patterns of political power.

But any justification of judicial use of the rationality requirement must come to grips with the Court's role in evaluating public policy. The rationality requirement poses all the recurrent questions of the proper place of the judicial veto in our scheme of government. And it poses those questions in extreme form because the tasks the requirement demands of the Court are relatively undefined.

Discussion of judicial power to hold legislation unconstitutional

must confront a fundamental source of tension: we are governed by a legislative democracy but the Constitution purposely and dramatically limits the things the legislature can do. It is common to think of the tension as the simple product of the initial decision to have a written Constitution. Our persistent ambivalence about the role of the Supreme Court in constitutional cases, however, can be appreciated only if it is seen as a function of our continuing ambivalence about legislative democracy. Initially, we both cherished and mistrusted legislative rule,[143] and we continue to do so.

One persistent theme of the attempts over the years to reconcile legislative democracy and constitutional limitations is literalism[144] in constitutional interpretation. Forty-three years ago Justice Roberts wrote that the Court's duty in constitutional cases is "to lay the Article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."[145] In more recent times, Justice Black was associated with insistence that the Constitution "means what it says."[146]

This theme is usually accompanied by a concession that constitutional history can be consulted as an aid to interpretation. Thus, Raoul Berger's recent book, *Government by Judiciary*, objects to courts "making law" as opposed to interpreting and applying it. But Berger's guide to constitutional meaning is the "will of the framers."[147]

Berger shows that the literalist tradition remains alive, but today it usually appears in a softer form than his. Justice Rehnquist is probably the most literalist of any present member of the Supreme Court. His referent for constitutional interpretation, however, is not solely the words and specific intentions of the draftsmen, but also the "values" that "may be derived from the language and intent of the framers."[148] And Richard Posner, another literalist of sorts, writes of a "constitutional goal"[149] apart from what the constitutional framers "con-

143. *See* THE FEDERALIST No. 78 (A. Hamilton).

144. John Ely has recently coined the word "interpretivism," *see, e.g.*, Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978), and that word more clearly captures the sense I want to convey. My criticisms of the fashion are quite distinct from his, however, and hence I will retain my own word in the text.

145. United States v. Butler, 297 U.S. 1, 62 (1936).

146. *See, e.g.*, W. MENDELSOHN, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 58 (1961).

147. R. BERGER, GOVERNMENT BY JUDICIARY 408 (1977). *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 672 (1966) (Black, J., dissenting).

148. Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693, 695 (1976). Justice Rehnquist appears not totally to have abandoned the rationality requirement. *See* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (Rehnquist, J., concurring); Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting); Kelley v. Johnson, 425 U.S. 238 (1976).

149. Posner, *supra* note 3, at 30.

sciously"[150] sought but still derived from their "specific purposes."[151] Both Justice Rehnquist and Professor Posner stress the relationship between their insistence on a measure of literalism and the democratic nature of our government.[152]

Literalism in constitutional law is doomed to failure, however, because it assumes too much about democracy and consequently looks for too little from its constitutional supplement. The generality of the commands of the fourteenth amendment, for example, causes trouble for the literalist. The only thing equal protection clearly was "intended" to mean, Professor Berger concludes, was that the formerly enslaved blacks were no longer to be treated unequally with respect to a limited list of "fundamental" rights. But if it had been "intended" to mean only that, the words used do not express that intention very well. That the clause is put more generally virtually assures that it will come to "mean" more regardless of what it was "intended" to mean.[153]

Berger insists that the framers of the fourteenth amendment had very specific things in mind when they used the phrases "due process" and "equal protection." Even assuming this is so, constitutional "intention" or "purpose" is a metaphor of considerably greater complexity than the comparable figure applied to statutory interpretation. It can hardly begin and end with what the draftsmen of the constitution alone had in mind. The ratification process for the original Constitution and particularly for amendments has involved many more people than the passage of any one statute. More importantly, those people have acted on behalf of many discrete bodies, not just two as in the case of a typical statute. After initial proposal there is little room for compromise among those in different bodies whose assent is necessary and hence scant justification for imputing the purpose of a person in one body to a person in another. The amalgamated initial "purpose" of constitutional language would thus be expected, other things being equal, to be considerably more complex than the initial "purpose" of a statute. In addition, while some statutory language is very general and some constitutional language rather specific, few statutory standards employ phrases as vague as "due process" and "equal protection." To the extent the people whose votes were necessary for inclusion of those standards in the Constitution formulated views about specific applications of the standards, they can be expected to have varied more widely than would usually be the case for specific application of statutory stan-

150. *Id.* at 22.

151. *Id.*

152. *Id.* at 28; Rehnquist, *supra* note 148, at 696.

153. *Cf.* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 60 (1955).

dards. Even proof that those who drafted the words gave them restricted meaning does not establish that others whose votes were necessary gave them the same restricted meaning. Absent specific indication that they did, the generality of the language suggests that they may well not have.[154]

Perhaps of more significance, it seems an unnecessarily crabbed view of constitutional "intention" to ascribe only substantive content to it. Statutes and constitutions and many contracts are formulated to govern the future relations among two or more people. In each instance, the need may arise to apply a governing standard in a way to which the parties whose initial consent was necessary had not specifically directed their attention. They may, however, have had a general shared understanding such that, had the question of the application been put to them at the time of their agreement, they would have been able to answer the question. Application of the standard for these sorts of questions can thus become a matter of fathoming that putative understanding. The parties may, however, have had no understanding—either formulated or unformulated—of the way a governing phrase would be applied to a given state of facts. Rather, they may have consciously or putatively "intended" that that particular application be put off to the future. Indeed, initial agreement may have been made possible only because some specific questions were not specifically answered. This last sort of "intention" may or may not be accompanied by a shared understanding of the decisionmaking mechanism by which such future questions would be settled.

The extent to which parties to a governing instrument will have shared this third frame of mind varies, of course, but it seems more likely to be present if the governing phrase is vague, the parties have some familiarity with past instances of such deferred decisionmaking with comparable instruments, and if the parties expect the governing standard to govern for a long time. In each of these respects it seems that the individual "purposes" relevant to understanding the "purpose" of the due process and equal protection clauses of the fourteenth amendment will likely have been to repose in the courts the authority to resolve multiple disputes in nonobvious ways into the distant future. This is evidenced by the vagueness of the phrases of the clauses, the fact that they were passed after a period of substantial experience with nonobvious court interpretation of constitutional phrases, particularly

154. Consider today the variety of meanings attributed to the words of the proposed equal rights amendment by the legislators considering it. They surely depart in many instances from the meaning assumed by those who first proposed the amendment. Berger completely misses the general point in a rush to insist that an unrevealed intention of the framers could not have been ratified by state legislatures. R. BERGER, *supra* note 147, at 116.

the commerce clause,[155] and the normal expectation for constitutional language that it is to govern for a long time.

It is even possible that a given person may have a substantive "intention" in the use of certain language but "intend" in addition that a procedure will be available by which that substantive intention could be reevaluated in light of changed circumstances.[156] Thus, the intent of some legislators, without whose votes the fourteenth amendment could not have been passed, may have been to erect the Supreme Court as a body with continuing authority to put content into the fourteenth amendment's general phrases.

There is, however, an even more fundamental problem with the literalist emphasis on the "will of the framers." Suppose that all parties currently subject to a governing instrument have an understanding of it directly at odds with the universally held intentions of its original framers. There will usually be some disruption, and perhaps a large quantum of disappointed expectations, if the current understanding is rejected. In the face of this consideration, is there an obvious reason to allow the framers' intention (if that is suddenly discovered) rather than the current understanding to govern?

One reason might be that the parties expect that result because their view of the "law" makes original intention govern. But views of "law" change just as do those about all aspects of human culture. Perhaps nothing is more likely to change views about "law" than recurrent disappointment of current expectations caused by adherence to an older view. We still adhere to a degree to the notion that original intention governs constitutional and statutory interpretation. But we are content to do so, I suspect, largely because other doctrines, such as stare decisis, minimize the mischief that unbending fealty to original intention could cause.

For statutes, I have suggested that the disappointment of current expectations can be avoided by allowing a nonrepeal purpose to displace the original purpose. Current constitutional understanding may not, however, constitute a "purpose" for nonrepeal of the constitutional provision, since an extraordinary majority is required for constitutional amendment. But with the original "purpose" of constitutional language both elusive and capable of much mischief if insisted upon, it seems inevitable that we would have developed the ability to overlook

155. Even Professor Berger seems to concede that the pre-fourteenth amendment commerce clause decisions served as a vehicle for the Court to shape the "amorphous" word "commerce" in a manner commensurate with its own views concerning prudent national policy. *Id.* at 284.

156. If the equal rights amendment to the federal Constitution is adopted, it will, I assume, be clear that part of its initial "purpose" was to erect the Supreme Court as a body with continuing authority to adjust its general phrases to changing realities.

on occasion even the most unanimously held original intention.[157]

Suppose, more realistically, that a governing instrument is variously understood by those currently subject to it. Suppose further that the interpretation of only a small minority coincides with the interpretation of those whose original consent to the instrument was necessary. That minority's view should probably be given greater weight in the interpretive choice than its numbers (or stake measured in some other fashion) might dictate, but only because its interpretation is likely more "reasonable." If its interpretation was identical to the drafters' only by coincidence, the majority or dominant interpretation should govern if that interpretation will do the least violence to current expectation and otherwise represents acceptable policy (including policy with regard to allocation of decisionmaking authority).

Even the literalists follow this advice in practice. Justice Rehnquist, for example, staked much of a recent dissent to a question of statutory interpretation on "reliance" by those affected on earlier court interpretations.[158] Writing for the Court in *Edelman v. Jordan*,[159] Justice Rehnquist interpreted the eleventh amendment to forbid federal courts from entering money judgments against state officials acting in their official capacity if the money would, as a practical matter, come out of state treasuries. The words of the eleventh amendment obviously command no such result. Justice Rehnquist based his decision on an assumed intention behind passage of the eleventh amendment that the federal courts not entertain suits effectively against the states.[160] But such an intention, if allowed to govern, would seem to require that

157. In the case of contracts, it is now widely accepted that the parties' actual behavior under a contract will govern future interpretations of that document, unless flatly inconsistent with express terms of the contract.

Section 2-208 of the Uniform Commercial Code provides:

1. [A]ny course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.
2. The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade.

It could be argued, of course, that "course of performance" is made relevant only because it is thought probative of original intention. Section 2-208 does, after all, leave express language dominant over course of performance. But course of performance will not always be determinative of present understanding of legal entitlement. The parties to a contract may have operated loosely under it, with a shared understanding that either retained the authority to reinvoke the terms of the contract. In the final analysis, recognition of the importance of actual current performance is the remarkable fact, even if this is done more comfortably by continued reference to an earlier state of mind as the operative fact.

158. *See* Monell v. Department of Social Serv., 436 U.S. 658, 714 (1978) (Rehnquist, J., dissenting). The majority also recognized the relevance of such reliance. *See id.* at 700.

159. 415 U.S. 651 (1974).

160. *See id.* at 660-63.

Ex parte Young[161] be overruled. *Ex parte Young* allows federal courts prospectively to enjoin unconstitutional action of state officials acting in their official capacity. To overrule it would be to administer a substantial jolt to the present understanding of the balance of authority in our governmental system. Justice Rehnquist's *Edelman* opinion distinguishes *Ex parte Young*,[162] and contains no hint that its authority is in jeopardy.[163]

A hypothetical example demonstrates the perplexing questions that literalism invites. Suppose persuasive evidence were now uncovered that the eighteenth century constitutional framers rejected the notion of judicial authority to hold statutes unconstitutional. The same could certainly not be said of the framers of the fourteenth amendment. They acted against a history of such judicial authority. Would the literalist conclude that no judicial review is now permissible because the fourteenth amendment draftsmen acted on a mistaken assumption about our constitutional system? Or would they conclude that the judiciary can enforce all provisions of the Constitution because the framers of the fourteenth amendment would have included such a power in that amendment if they had thought it was otherwise in doubt? Or would the literalists allow judicial enforcement of the fourteenth amendment but not earlier provisions? And, finally, what happens five years from now when the "persuasive evidence" is shown to have been mistaken?

The answer, of course, is that original draftsmen can only get us started. The expectations they share and arouse in contemporaries and derivatively in their successors are what they contribute to the rule of law in each generation. But it is the expectations of each succeeding generation, interacting with evolving notions of public policy, that matter. If the complex flow of human society arouses expectations at odds with those of an instrument's promulgators, those originally responsible, alas, can no longer rule. It was always so, and it can never be otherwise.

The literalist invocation of "democratic" values to resist a judicial veto is also simplistic. Our prior discussion of the rationality balance suggests that findings of unconstitutionality in the name of the rationality requirement may help to fulfill rather than to thwart a democratic ideal in decisionmaking. Any such conclusion depends, of course, on one's understanding of the objectives of "democratic" decisionmaking.

161. 209 U.S. 123 (1908).

162. 415 U.S. at 664-68.

163. One commentator suggests that the intention behind the eleventh amendment is actually consistent with both *Edelman* and *Ex parte* Young. *See* Note, *Applicability and Waiver of States' Eleventh Amendment Immunity*, 88 HARV. L. REV. 243 (1974). Justice Rehnquist's opinion, however, discusses no such reconciling original intention. *Cf.* Alabama v. Pugh, 438 U.S. 781 (1978).

Decisionmaking by majority rule in an elected legislature might be valued for its own sake, particularly once it has become institutionalized.[164] But surely much of the democratic appeal lies in some presumed relationship between the values of individual citizens and the social choices that a democracy makes.[165] The "popular will" is recurrently invoked by those who are wary of judicial intervention in the name of the Constitution.[166]

There are, however, two very different senses of popular will that it could be the goal of a "democratic" government to reflect. Popular will could be the majority (or perhaps plurality) opinion on a question, with each vote given equal weight. This seems to be the sense of popular will informing the Supreme Court's "one-man, one-vote" decisions,[167] and it has a substantial hold more generally on our political consciousness. I take as indications of this the progressive extension of the vote to new groups throughout our history and the continuing attention in the popular media to polling efforts to discern the majority opinion in the country on a great variety of issues.

In the first section of this Article we explored a very different sense of "popular will:" one that weights individual values not only in proportion to the number of individuals holding them, but also in proportion to the intensity with which the views are held. This notion of "popular will" probably has less "popular" appeal as the democratic ideal, but it certainly plays a significant role in fact in modern democratic decisionmaking. Political science and economics are often married in attempts to explore the ways in which the political process manages to weight individual values by intensity.[168]

None of these reasons for valuing democratic decisionmaking provides a very decisive argument against the judiciary as an independent seat of authority to influence policy. Accepting the decisions of legislative democracy for their own sake provides no reason for preferring them to those of any other decisionmaking mechanism one values. In particular, our society might as well accept the decisions of its legislative democracy as modified by the judicial veto. That, after all, has been the traditional American experience.

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164. Professor Posner says, "The real justification for most legislation is simply that it is the product of the constitutionally created political process of our society." Posner, *supra* note 3, at 29. Dean Sandalow agrees. *See* Sandalow I, *supra* note 3, at 660 n.21.

165. "Government and politics are after all the arms, not the end, of social life." Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 195 (1952).

166. Rehnquist, *supra* note 148, at 698; Linde, *supra* note 3, at 232-34.

167. Reynolds v. Sims, 377 U.S. 533 (1964); Westberry v. Sanders, 376 U.S. 1 (1964).

168. The two classic studies are J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962), *discussed at* text accompanying note 80 *supra*, and A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

Popular will as majority sentiment can do little harm to the case for judicial policy involvement in the name of the Constitution, principally because its explanatory power for "democratic" decisionmaking is so limited. There are surely some occasions—for example, holding unconstitutional laws that provide criminal penalties for abortions performed within the first trimester—where the Court's policy decisions have been more faithful to majority sentiment in the country than are those reached by the more "democratic" branch.[169]

The explanatory force of the weighted sense of popular will is also limited, though perhaps less so than the majority sentiment sense. We have noted that the typical majority vote rule in legislatures can suppress minority legislative sentiment, regardless of its intensity. There are, of course, many limitations on the operation of the majority vote rule, including agenda setting powers of committees, committee officers and party leaders, nonmajority vote rules for assignment to those offices, and rules and practices of debate (such as filibusters and amending limitations).[170] Some of these may actually operate to enhance minority bargaining power, but there seems no reason to conclude they do so in any way that systematically compensates for the minority handicaps in the process. The judicial rationality balance, if exercised with an eye to minority disadvantage in the legislative process, might well compensate for that disadvantage with more effectiveness than do the impediments to majority rule in the legislative setting.

The legislative process, moreover, is only the final step by which citizen values are translated into governmental choices. The correlation between weighted citizen policy preference and legislative choice is likely to be much more imperfect than between legislator choice and legislative policy outcome.[171]

A vote trading model cannot very usefully be extended to explain policy outcomes in the popular electoral process. If a vote in this setting is considered the unit of currency and ultimate policy decisions are the goods being purchased, the impediments to "free trade" are overwhelming. There is little product differentiation. The votes directly buy candidates, not policy decisions. With any candidate, the voter thus purchases a huge package of variegated policy decisions, attitudes, and inclinations, but hardly a refined choice among policies. The occa-

169. *See* Gallup Poll Index, *Report No. 92*, (Feb. 1973). Obviously, the counting is more complex than this suggests, since the legislative decisions were made on a state-by-state basis. *Cf.* Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283 (1957).

170. *See generally* Choper, *The Supreme Court and The Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810 (1974).

171. A. DOWNS, *supra* note 168, provides the most extensive theoretical treatment of the sources of distortion in the electoral process as it translates elector values into legislative decisions.

sions for "purchase" even of these undifferentiated packages come infrequently and there is almost no opportunity for trading among voters. The votes are cast in secret, so there can be no effective enforcement of any "deals." And there is much "illegitimate" currency in circulation, including money and personal influence, so that some voters have vastly more purchasing power in the election than others with the same one vote of legitimate currency.

Voter influence on policy decisions goes on between elections, of course, but at those times there is even less of a pretense that each voter has equal currency with which to buy. As Professor Posner urges, legislative policy decisions are influenced by interest groups' "money . . . cohesiveness, ability to make credible threats of violence or other disorder" in addition to the number and intensity of feeling of the voters they represent.[172]

Each of the stages of our "democratic" process for translating elector policy preferences into legislative policy, then, falls short of a democratic ideal, in either of its two most apparent senses. Perhaps the best we can say about the process as a whole is that we know that voters have some ability, surely not insubstantial, to influence policies about which they have well-formulated views in large numbers or particularly intense views in even relatively small numbers. But we surely know in addition that much besides their "democratic" power to vote influences virtually all and dominates many legislative policy choices.

I am certainly not urging that judicial policy choices are more "democratic" than legislative ones. There are popular constraints, both formal and informal, on judicial decisionmaking, but the Court is designedly insulated from most of these. Its assumed major constitutional function is to protect certain values in the face of substantial popular challenge to them. I am urging merely that any challenge to Court policy involvement on "democratic" grounds must first explain more precisely what it is that is meant by "democracy" and why that "democracy" is to be valued.[173]

Hans Linde offers a somewhat different objection to Court-imposed value judgments in the name of the rationality requirement. He does suggest the "democracy" objection: "[M]any lawyers and judges feel that there must be a better reason for a law than that it was enacted by more than one-half of those voting on the issue in a legislative body."[174] But Linde appears willing to dispense with the literalist

172. Posner, *supra* note 3, at 27.

173. Professor Bishin provides an extensive treatment of the ambiguities in the statement that our constitutional form of government is or was intended to be "democratic." Bishin, *Judicial Review in Democratic Theory*, 50 So. CAL. L. REV. 1099 (1977).

174. Linde, *supra* note 3, at 206.

ideal. His discussion of judicial disapproval of "prejudices" suggests acquiescence, even if only begrudging, in "constitutional" constraints not dictated by constitutional text or history.[175] The constraint that Linde substitutes to reconcile constitutional limits with democracy is a conception of law. For him, a constitutional rule is "addressed to government in the first instance, and to judges only upon a claim that a government has disregarded such a directive."[176] It "must make sense not only as a criterion for judicial review but as a theory for the constitutional conduct of government antecedent to judicial review."[177] To have his work appropriately declared unconstitutional by a court, a legislator, for Linde, must have had some substantial basis on which he could have made that judgment for himself beforehand.

With these aspirations for constitutional law it is inevitable that Linde would find the rationality requirement unacceptable. Apart from the lack of definition in the rationality balance and the legitimate purposes limitation, when the Court assesses whether the requirement is met on the basis of current realities, rather than on facts at the time of passage, it treats legislative ability originally to comply with constitutional "law" as irrelevant.

But Linde's conception of law cannot govern the domain he assigns it. Judically announced standards frequently guide those for whom they are relevant. But "[i]n an important sense legal rules are never clear,"[178] and guidance of primary conduct is certainly not their only function. Most important, the rationale for a decision in terms of legal "rules" helps legitimate the Court's assertion of power to adjudicate disputes by grounding the adjudications in reason and helping assure equity as between factually similar disputes.

The appropriate degree of certainty for legal rules varies enormously with the context. Where the dispute involves the acceptability of legislation and the legal constraints are constitutional, insistence that the rules must provide guidance to the legislators seems particularly questionable. Legislatures are unwieldy bodies to guide, since they have many members and no leaders with official authority to act for them externally.[179] The delay in judicial review removes much of the incentive legislators might otherwise have to follow even the clearest of rules. But most importantly, much legislation is episodic. The legislature deals with a pressing problem and then moves on to some other

175. Linde does say that Court concern with prejudices reflects "values located somewhere in the Constitution." *Id.* at 203. He provides no guidance for the search.

176. *Id.* at 206.

177. *Id.* at 207.

178. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949).

179. *Cf.* D. TRUMAN, THE GOVERNMENTAL PROCESS 487 (1951).

subject. What a court could have said in the past or might say in the future will frequently have little potential for guiding legislative decisionmaking. When constitutional decisions deal with recurrent problems such as state aid to church-related schools, reasonably clear constitutional standards can to some degree guide legislative activity. For most legislative decisions, however, any guidance a court gives will be of relatively little importance.

Justice Brandeis warned that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[180] But he wrote to distinguish constitutional law from "most matters." He might also have warned that in most matters, including constitutional ones, it is more important that disputes be settled than that they be settled right. But that most constitutional disputes be settled right is surely more important than that they be settled according to standards a legislature could have followed beforehand.

In the end, the rationality requirement cannot be judged against some a priori standard of "democracy" or "law." It must be judged largely by the uses to which it is put, and the success with which it is put to those uses. That a society as dedicated as is ours to a constitution limiting "democratic" decisionmaking should have nurtured an ongoing insitution to do the same should strike few as surprising. What the Court does with that authority in the form of the rationality requirement (and in other forms) is what matters primarily.

Consistency in the use of the rationality requirement is important, but not because legislatures need or are entitled to much guidance. Consistency is important because the Court is no more entitled to exercise arbitrary power than is the legislature. The legitimacy of what the Court does ultimately depends upon its articulation and fidelity—enduring, but not unbending, fidelity—to theories of constitutional decisionmaking that are theoretically acceptable and capable of being fulfilled through the adjudicatory process.

It is easier to be comfortable with the theory of the rationality requirement than with the Court's application of it. Its theory addresses concerns that have deep roots in our political consciousness, including dominance of legislatures by "factions"[181] and by popular prejudices, while the impecunious, the ill-organized, and the stigmatized are excluded from the legislative process. Much of what the Court has done with the requirement is understandable in these terms. The recent decisions lending succor to illegitimate children and women disfavored by the political process have been markedly successful. The poor,[182]

180. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932).

181. *See* THE FEDERALIST No. 10 (J. Madison).

182. Shapiro v. Thompson, 394 U.S. 618 (1969) (alternative holding).

the imprisoned,[183] and the objects of popular prejudice[184] have frequently been beneficiaries of rationality requirement decisions.

But much about the Court's use of the requirement remains puzzling and inconsistent. The recent cases dealing with discrimination against women, for example, started out as rationality requirement cases. The Court then waivered, apparently believing that a more stringent standard was necessary to reach such discrimination.[185] A more stringent standard was then later applied to strike down discrimination against males between eighteen and twenty-one years of age, despite the fact that the state legislation was supported by ample evidence of its service of the clearly legitimate goal of safer driving by teenagers.[186] An understandable solicitude for women, once loosed from its rationality moorings, had become an incomprehensible abhorrence of all gender-based differentiations.[187]

There are other signs of the Court's discomfort with the requirement. It retains the purpose and facts' fictions on the books[188] but often ignores them, appearing not to know when their use is appropriate. It shifts the burden of decision from the legitimate purposes component to the rationality balance without acknowledging that it is doing so. In the process it avoids articulating the standards of legislative legitimacy that guide it. It uses the rationality requirement to reach decisions better grounded in other doctrines and introduces extraneous considerations when the rationality requirement would suffice.[189]

The Court has been groping for other standards,[190] without realizing that the rationality requirement will largely suffice, if it will only look the requirement in the eye. The requirement can incorporate most of the Court's appropriate concerns, while unnecessary proliferation of other standards will only breed confusion.

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183. Rinaldi v. Yeager, 384 U.S. 305 (1966).

184. Wieman v. Updegraff, 344 U.S. 183 (1952).

185. *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

186. Craig v. Boren, 429 U.S. 190 (1976). The standard applied was clearly more stringent than the rationality requirement although it cannot really be identified with the standard in *Frontiero*, where there was no opinion for a majority of the Court.

187. *See also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

188. *See* text accompanying notes 39-43 *supra*.

189. One such example is Shapiro v. Thompson, 394 U.S. 618 (1969), the decision holding durational welfare residence requirements unconstitutional. Even if the Court could have identified a legitimate purpose for the residence requirement, the burdens imposed on politically helpless recent welfare arrivals was so great that the rationality requirement would have sufficed for a determination of unconstitutionality. *Cf.* Bennett, *Liberty, Equality and Welfare Reform*, 68 NW. U.L. REV. 74, 98-99 (1973). Instead, the Court relied in part on a rationality analysis and then proceeded to introduce doctrine about the "right to travel" it could not live with in subsequent cases. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393 (1975). *See also* Califano v. Aznavorian, 439 U.S. 170 (1978).

190. *See* cases at note 34 *infra*.

This is not to say that the rationality requirement adequately expresses all constitutional concerns. It cannot really be employed[191] to give special constitutional protection to certain interests, like speech or religion, jury trials or travel, privacy or voting. It does not allow the Court to redress past grievances, as may be appropriate when dealing with the problems of long and severely disadvantaged minorities. The rationality requirement could be adapted to accommodate presumptions of illegitimate purpose, as may be appropriate in racial or other contexts. But when this is done the test is so altered that a different formulation is probably preferable.[192]

Part of the Court's uneasiness with the rationality requirement may stem from the implications of a consistent rationality requirement for certain economic regulations. An often cited example of the Court's desire to avoid the excesses of the *Lochner* era[193] is *Williamson v. Lee Optical Co.*[194] In *Williamson*, the State had forbidden anyone other than an optometrist or opthamologist to fit eyeglasses without a prescription from one of those professionals. The Court rejected a challenge from disadvantaged opticians, upholding the legislation by reference to good eye care purposes it might have been thought to serve. Professor Posner says that "the true purpose of the statute in *Lee Optical* was [almost certainly] to protect the optometrists from competition."[195] But apparently without realizing the inconsistency with his position on left-handed driver regulation,[196] he counsels the Court not to disturb legislation so motivated. If the Court were to apply the rationality requirement consistently, it would have to address the question of the legitimacy of protecting optometrists, at least if it confidently shared Posner's conclusion about the statute's purpose.

Perhaps the days of *Lochner* are far enough behind us so that the Court can directly face such questions of legislative legitimacy. In a recent series of decisions grounded in the first amendment the Court has begun to forbid restrictions on advertising that were probably motivated, at least in major part, by economic protectionism closely akin to that apparently at work in *Williamson*.[197] If this presages a willingness to apply seriously the rationality requirement to economic regulation,

191. *But see* note 87 *supra*.

192. A major problem with the compelling state interest test is its failure to acknowledge the centrality of illegitimate motivation. If, as the Court now seems to insist, illegitimate purpose is necessary for a conclusion of unconstitutional racial discrimination, it should also be sufficient. If a discrimination against blacks would not have been passed but for racial animus, the fact that it might be thought to serve some compelling state interest in addition should be irrelevant.

193. *See* Linde, *supra* note 3, at 209.

194. 348 U.S. 483 (1955).

195. Posner, *supra* note 3, at 29.

196. *See* text accompanying notes 129-30 *supra*.

197. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, 425

the Court might then be induced to address more forthrightly the requirement's implications for social welfare programs from which the Court has hidden with the claim that they were just like economic regulation.[198]

But economic regulation and social welfare classifications are not alike in relevant respects. The members of larger welfare families the Court refused to aid in *Dandridge v. Williams*[199] were politically helpless, while the opticians in *Williamson* may well have been active traders in a political bargain they later regretted.[200] But if the Court is convinced that no legitimate purpose is served by either measure, or that the burdens imposed in the service of some legitimate purpose are irrationally severe, the rationality requirement would dictate that each measure be held unconstitutional.

In carrying out its prescription, the rationality requirement provides no formula as a substitute for judgment. Nor does it provide any cure for democracy's deficiencies. The Court only acts in response to disputes brought to it. There will be many disputes it will never see, often because those aggrieved by the legislative process do not have the wherewithal to prevail through the judicial process either. And even for those disputes coming to court, the information uncovered by the litigation process is only rarely sufficient to enable the Court to know with appropriate assuredness that the legislative process has acted illegitimately or irrationally.

With this in mind, it can be seen that the justification for judicial review, like that for legislative democracy, is partly symbolic. The reality of pressure group politics is probably less significant than the symbol of popular participation a legislative democracy provides. Learned Hand spoke of satisfaction "when I go to the polls . . . in the sense that we are all engaged in a common venture."[201] The Court is likely valued, too, not because it does perfect "democratic" decisionmaking, but because it is symbolic of a desire to do so. There are many levers of influence in the legislative process. It is responsive to persons with power, connections, numbers, and organization. The judicial branch, on the other hand, while not always true to this ideal, holds itself open to the lonely individual, and even to the poor one. And it is above the political fray without, at least in the case of life-tenured federal judges, the obvious self-interest of legislators in the substance of their deci-

U.S. 748 (1976). In a lesser noted part of *Williamson*, the Court upheld a restriction on the advertising of optical appliances. 348 U.S. at 489-90.

198. *See* note 70 *supra*.

199. 397 U.S. 471 (1970).

200. *Cf.* Karst, *supra* note 27, at 724 (suggesting that the opticians may have anticipated changes in the legislature which would result in favorable amendments to the statute).

201. L. HAND, THE BILL OF RIGHTS 74 (1958).

sions.[202] The courts provide a forum in which a person who feels powerless to influence the legislative process can pursue a claim that what that process has yielded is offensive to values inadequately weighed by the legislative process. That those challenges usually fail is surely essential to the form of government we have chosen. That they occasionally succeed may well add to its strength.

202. Raoul Berger probably rightly notes that "all wielders of power, judges included, ever thirst for more." R. BERGER, *supra* note 147, at 250. What he misses is the radically different incentives of life-tenured judges. *See* A. DOWNS, *supra* note 168.